TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~707~~ 69

SAFEWAY STORES, INCORPORATED, PETITIONER,

vs.

HARRY V. VANCE, TRUSTEE IN BANKRUPTCY FOR FRANK MELVIN THOMPSON, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES [redacted] COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 22, 1957

CERTIORARI GRANTED MARCH 4, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 707

SAFEWAY STORES, INCORPORATED, PETITIONER,

vs.

HARRY V. VANCE, TRUSTEE IN BANKRUPTCY FOR FRANK MELVIN THOMPSON, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5566

HARRY V. VANCE, Trustee in Bankruptcy for Frank Melvin Thompson, a Bankrupt, Appellant,

vs.

SAFEWAY STORES, INCORPORATED, a Corporation, Appellee

STATEMENT OF POINTS—Filed April 9, 1956

The points upon which Appellant intends to rely on this appeal are as follows:

1. The Court erred in dismissing Plaintiff's First Amended Complaint for failure to state a claim.

2. The Court erred as a matter of law in holding that Section III of the Robinson-Patman Act, (Title 15 U.S.C. Section 13a) does not afford a civil remedy for treble damages.

Nordhaus & Moses, by Robert Nordhaus, Attorneys for Appellant.

[fol. 2] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Pleas and Proceedings Before the Honorable Waldo H. Rogers, United States District Judge for the District of New Mexico, Presiding in the Following Entitled Cause:

HARRY V. VANCE, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED, a Corporation, Defendant

No. 2930, Civil

FIRST AMENDED COMPLAINT—Filed November 15, 1955

Plaintiff states for his first amended complaint:

I. That plaintiff is a citizen of Albuquerque, New Mexico, and is the Trustee in Bankruptcy of Frank Melvin Thompson, who was adjudicated a bankrupt in this court on May

28th, 1955, in cause numbered 2235 in Bankruptcy; that Frank Melvin Thompson is a citizen of New Mexico.

II. That defendant at all times material hereto was and now is a corporation organized and existing under the laws of the State — Maryland and qualified as a foreign corporation in New Mexico.

III. That from about the year 1948 until May, 1955 the said Frank Melvin Thompson owned and operated a retail grocery store and market in said City of Albuquerque under the trade name and style of New York Food Market.

IV. That as of December 31st 1954 defendant was the second largest food chain in the United States, operating more than 2,000 supermarkets in 24 states of the United States and in five provinces of Canada, with sales in the [fol. 3] United States in the year 1954 of over $1,600,000,000; that defendant employed over 49,000 persons in that year, and its facilities included the following: 33 grocery warehouses, 24 produce warehouses, 11 meat warehouses, 24 bakeries, 2 jam and jelly plants, a candy plant, 11 fluid milk plants, 9 ice cream plants, 7 coffee roasting plants, a fruit cannery and a vegetable cannery; that food products manufactured, processed and stored in the various installations mentioned in this paragraph were at all times material hereto shipped from these installations in interstate commerce directly to defendant's supermarkets in the City of Albuquerque, New Mexico, where they are sold at wholesale and retail to consumers and others.

V. That at all times material hereto, defendant's operations in the District of New Mexico, and the economic consequences of such operations, were as follows:

a) Defendant's store operations in the United States are divided into 15 Distribution Divisions, one of which is the El Paso Division which serves West Texas and New Mexico including the City of Albuquerque and vicinity; defendant operates approximately 41 stores in 26 cities within the El Paso division, 15 of which are in Texas and 26 in New Mexico. Total sales by all of defendant's stores in 1954 in the El Paso Division were over $37,000,000.

b) Defendant was and is the dominant distributor and retailer of food products in West Texas and New Mexico,

selling substantially more food and food products in its stores than any of its competitors.

c) Defendant supplied and now supplies all of its retail stores in New Mexico from warehouse facilities it operates in El Paso, Texas, transporting the greater portion of the food products sold in its stores in its own trucks from outside New Mexico directly to its stores in Albuquerque and elsewhere in New Mexico.

d) Defendant's sales in its stores in Albuquerque were and are made both at wholesale and retail.

e) By reason of defendant's relatively unlimited financial resources, as heretofore mentioned, its extensive processing and storage facilities located throughout the United States, its centralized management, and its domi- [fol. 4] nant position as a food distributor and retailer in West Texas and New Mexico, defendant was and is able to destroy competition in the City of Albuquerque at the will of its management.

VI. That at various times material hereto and particularly during the period September 1, 1954 to the date of filing this complaint, defendant, at the direction of its management located in El Paso, Texas, and Oakland, California, sold goods in the course of interstate commerce in its stores in the said City of Albuquerque at prices substantially lower than prices exacted by defendant for the same goods in other cities and towns in New Mexico and elsewhere in the United States, for the purpose of destroying competition in the grocery business in the said City of Albuquerque, in violation of Section 3 of the Act of Congress of June 19, 1936, commonly known as the Robinson-Patman Act (49 Stat. 1528, 15 U.S.C. 13a) and Section 4 of the Clayton Act as amended (38 Stat. 731, 15 U.S.C. 15); that substantially all of the said prices were established from time to time by defendant's management located outside of New Mexico, without any substantial intervening discretion being exercised by defendant's employees in New Mexico. That practically all of defendant's advertising and merchandising policies, including the price wars herein complained of, were directed to the last detail by defendant's management from outside of New Mexico.

VII. That at various times material hereto, and particularly during the period September 1, 1954 to the date of filing this complaint, defendant sold goods in the course of interstate commerce in the said city of Albuquerque at unreasonably low prices for the purpose of destroying competition in the grocery business in the said City of Albuquerque, in violation of Section 3 of the Robinson-Patman Act, and Section 4 of the Clayton Act, as amended, hereinabove cited; that substantially all of such prices were established from time to time by defendant's management located outside of New Mexico, without any substantial intervening discretion being exercised by defendant's employees in New Mexico; that defendant's advertising and merchandising policies with respect to such sales were directed in detail by its management from outside New Mexico.

[fol. 5] VIII. That the goods sold in violation of the Robinson-Patman Act as alleged hereinabove in paragraphs VI and VII included the following:

Soft drinks, especially Coca Cola
Coffee, regular grind, drip and instant
Family flour
Butter
Magarine
Milk, fresh and canned
Fresh bread
Shortening
Sugar, beef, cane and brown
Soaps and detergent
Salad Dressing

and many other articles of food; that the articles specifically mentioned herein are staple items of food, important in the budget of every housewife, and best calculated when advertised at unreasonably low prices to attract large numbers of customers from competitors and to destroy competition; that the grocery items hereinabove mentioned constitute a substantial portion of total volume of sales in the grocery industry, and competitors of defendant, not as strong financially as defendant, could not afford to sell such items at unreasonably low prices over a period of

time and remain in business; that defendant engaged in a policy, directed by its management located outside of New Mexico, to sell the above mentioned articles in its stores in Albuquerque (the greater portion of said articles being delivered by defendant's trucks from outside New Mexico, directly to its retail stores in Albuquerque) at unreasonably low prices over a period of more than six months, with the knowledge and intent that such action would destroy a number of its smaller competitors in Albuquerque; that in truth and fact, the result intended by defendant was accomplished, and a number of its competitors, including plaintiffs, were destroyed as the proximate result of the illegal actions of defendant described in this complaint.

IX. That as a proximate result of each and every one of the defendant's unlawful actions described in this complaint, the said Frank Melvin Thompson suffered loss of business and profits in the years 1954 and 1955 to his damage in the sum of $20,000.00.

[fol. 6] X. That said loss of business and loss of profits proximately resulting from defendant's illegal actions hereinabove described caused the said Frank Melvin Thompson to become insolvent and to lose his grocery and market business in the month of May, 1955, together with all other non-exempt personal and real property owned by him, to his damage in the sum of $25,000.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of $45,000.00, and that said judgment so recovered be trebled, in accordance with the terms of the statute; for reasonable attorney's fees; for costs of suit and for such other relief as to the Court may seem just.

Nordhaus & Moses, by Robert Nordhaus, Attorneys for Plaintiff.

In United States District Court for the District of New Mexico

Motion to Dismiss Plaintiff's First Amended Complaint —Filed November 30, 1955

Comes now the defendant, Safeway Stores, Incorporated, and moves the Court for an order dismissing the first amended complaint in the above entitled cause for the following reasons and upon the following grounds:

I. The first amended complaint fails to state a claim or claims upon which relief can be granted, in that it does not contain a short and plain statement of the claim or claims showing that the pleader is entitled to relief as required by Rule 8 (a) of the Federal Rules of Civil Procedure.

II. The first amended complaint fails to state a claim or claims upon which relief can be granted in that it does not allege sufficient facts with particularity to state a violation or violations of Section 3 of the Robinson-Patman Act (15 U.S.C.A. 13a) as is required of complaints purporting to allege violations of said Act.

III. The first amended complaint fails to state a claim or claims upon which relief can be granted and fails to es- [fol. 7] tablish the jurisdiction of this Court over the subject matter of this action for the reason that said complaint does not concern transactions, occurrences or activities taking place in the course of interstate commerce and within the scope of Section 3 of the Robinson-Patman Act (15 U.S.C.A. 13a).

IV. The first amended complaint fails to state a claim or claims upon which relief can be granted under Section 3 of the Robinson-Patman Act (15 U.S.C.A. 13a) for the reason that said section is unconstitutional, being so vague and indefinite that it violates the Fifth and Sixth Amendments to the Constitution of the United States, having no reasonable relation to the anticipated evil and constituting an unreasonable interference with freedom of contract as guaranteed by the Fifth Amendment to the Constitution of the United States.

V. The first amended complaint fails to state a claim or claims upon which relief can be granted under Section 3 of

the Robinson-Patman Act (15 U.S.C.A. 13a) for the reason that said Section is not one of the "antitrust laws" within the purview of Section 4 of the Clayton Act (15 U.S.C.A. 15), and no private right of action for violation of said Section exists under any laws of the United States.

VI. The first amended complaint fails to state a claim or claims upon which relief can be granted under Section 3 of the Robinson-Patman Act (15 U.S.C.A. 13a), for the reason that said complaint fails to allege facts establishing a violation of Section 3 of the Robinson-Patman Act or facts demonstrating injury to plaintiff's business or property on account of an alleged violation of said section.

Wherefore, upon the grounds stated defendant respectfully prays that the first amended complaint be dismissed.

W. A. Keleher and John B. Tittmann, By John B. Tittmann, Attorneys for Defendant.

[fol. 8] In United States District Court for the District of New Mexico

Order Dismissing Complaint—Filed January 18, 1956

The above styled and numbered cause coming on for hearing before the court upon the defendant's motions to dismiss, to strike and for a more definite statement, and the parties appearing by their respective counsel, the court having considered the briefs submitted by respective counsel, having heard argument of counsel, and being fully advised and informed, finds and concludes that defendant's motion to dismiss the complaint herein should be granted on the ground that Section 3 of the Robinson-Patman Act (Title 15 USC Section 13a) does not afford to a private litigant a civil remedy for treble damages within the purview of Sections 1 and 4 of the Clayton Act (Title 15 USC Sections 12 and 15), and that no decision is necessary upon the other grounds of said motion to dismiss or upon the remaining motions.

Wherefore, it is ordered, adjudged, and decreed: That plaintiff's complaint herein be and the same hereby is dismissed upon the ground above stated.

It is further ordered that plaintiff be and he hereby is granted 30 days from the entry hereof to amend his complaint.

Waldo H. Rogers, District Judge.

O. K. as to Form Nordhaus & Moore Attys for Plaintiff.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

OPINION OF THE COURT—January 19, 1956

This cause comes before the Court upon the first Amended Complaint filed by Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, a Bankrupt, against Safeway Stores, Incorporated, a corporation, and a Motion to Dismiss said First Amended Complaint, a Motion of the Defendant for a More Definite Statement of Plaintiff's First Amended Complaint, and a Motion to Strike from said First Amended Complaint certain allegations contained in the last-mentioned pleading. Plaintiff seeks [fol. 9] Judgment against the Defendant in the sum of Forty-Five Thousand Dollars ($45,000.00) and that the Judgment so recovered be trebled, for reasonable attorneys fees, costs of suit, and for other equitable relief under an alleged violation of Section 3 of the Act of Congress of June 19, 1936, commonly known as the Robinson-Patman Act (49 Stat. 1528, 15 U.S.C.A. 13a) and Section 4 of the Clayton Act, as amended (38 Stat. 731, 15 U.S.C.A., Section 15).

A short summary of the allegations contained in the Amended Complaint, are deemed necessary for a proper presentation of the questions of law arising by the attack levied against the Amended Complaint by the above-mentioned Motions.

The Complaint alleges that Vance is the Trustee in Bankruptcy of Thompson, who was adjudicated a bankrupt may 28, 1955, Thompson being a citizen of New Mexico; that the defendant is a Maryland corporation, qualified as a foreign corporation in New Mexico; that from 1948 until May, 1955, Thompson operated a retail grocery store

May 28, 1936, and it and the Robinson-Patman Bill went to conference. The Conference Committee reported a revised draft on June 8, 1936, incorporating the Borah-Van Nuys amendment as Section 3.

The following excerpts from the Congressional Record show that Section 3 is a separate criminal statute, not to be construed in connection with other Sections of the Robinson-Patman Act, and not a part of the Anti-trust Laws: Rep. Patman, co-author of the Robinson-Patman Act, in his testimony before a sub-committee of the House Judiciary Committee on May 10, 1950, stated that Section 3 was definitely not a part of the Clayton Act or of the Anti-trust Laws:

"* * * section 3 of the Robinson-Patman Act has never been added to the list of laws designated as 'antitrust laws' in section 1 of the Clayton Act.

"* * * the House did not put section 3 in that act, it was put in in the Senate, Senator Borah and Senator Van Nuys were the authors, it was put in and in conferences, to get a bill, we agreed for it to stay in. Since that time section 3 has not been carried as part of the antitrust laws. It should be. I hope that you will consider making it clear in this bill."

(Hearing on House H. R. 7905, Serial No. 14, Part 5, p. 48, 81st Cong., 2d sess.).

Rep. Miller, one of the conferees of the measure, stated as follows, (80 Cong. Rec. 9421):

"Section 3, which the gentleman from New York talks about, is the Borah-Van Nuys amendment and that is the criminal section of this bill. * * * Section 3 in the bill is placed in an effort to make the criminal offense apply only to that particular section, and believe that is a reasonable construction, if you will look at the bill."

Rep. Miller further stated:

[fol. 25] "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here amends section 2 of the Clayton Act." (Italics supplied).

in Albuquerque, New Mexico. There then followed a statement descriptive, according to the plaintiff, of the defendant corporation. In effect, it alleges that the defendant is the second largest food chain in the United States, operating more than two thousand supermarkets in twenty-four states, having a very large sales in the United States, employing over forty-nine thousand persons, and owning and operating various warehouses, bakeries, candy plants, milk plants and similar food processing establishments. It is thereafter alleged that defendant's operations in the United States are divided into fifteen distribution divisions, one of which is the El Paso Division serving West Texas and New Mexico, including Albuquerque. Defendant is alleged to be the dominant distributor and retailer of food products in West Texas and New Mexico, and that it supplies its retail stores in New Mexico from warehouse facilities operated in El Paso, Texas, transporting the greater portion of the food products sold in its stores in its own trucks from outside New Mexico, directly to its stores in Albuquerque, and elsewhere in New Mexico. An allegation appears that defendant's sales in its stores in Albuquerque are both at retail and wholesale. There then appears an omnibus allegation that by reason of defendant's unlimited financial resources, and its processing and storage facilities, its centralized management and its [fol. 10] dominant position as a food distributor in this region, defendant was and is able to destroy competition in the City of Albuquerque, at the will of its management. It is then alleged that between September 1, 1954, to the date of the filing of the Complaint, defendant, at the direction of its management located in El Paso, Texas, and Oakland, California, sold goods in the course of interstate commerce in its Albuquerque stores, at prices substantially lower than prices exacted by defendant for the same goods in other cities and towns in New Mexico, and elsewhere in the United States, for the purpose of destroying competition in the grocery business in the City of Albuquerque, in violation of those sections of the Federal Statutes first above cited. It is specifically alleged that substantially all the prices were established by defendant's management located outside of New Mexico. Certain goods are attempted to be specified as having been sold in viola-

Rep. Miller, when asked whether Section 3 was "a part of the same act" as the part of the bill amending the Clayton Act, replied, (80 Cong. Rec. 9421):

"Of course it is; but it is not a part of the Clayton Act as amended by section 2 (Section 1 of the Robinson-Patman Bill)."

The Conference Committee report, House Report No. 2951, 74th Congress, 2d sess., p. 8 (80 Cong. Rec. pp. 9414-9415) states:

"* * * Section 3 of the bill * * * contains the operative and penal provisions of what was originally the Borah-Van Nuys bill (S. 4171). While they overlap in some respects, they are in no way inconsistent with the provisions of the Clayton Act amendment provided for in section 1." (Italics supplied)

Rep. Utterback, Chairman of the House Managers, stated as to Section 3, as follows, (80 Cong. Rec. 9419):

"Section 3. Penal provisions. Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the scope or operation of the prohibitions or limitations laid down by the Clayton Act amendment provided for in section 1." (Italics supplied).

The distinction between Section 3 and Section 1 of the Act is further manifest by the conference committee report, which stated:

"Section 3 authorizes nothing which that amendment (Section 1 of the Robinson-Patman bill) prohibits and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of the amendment provided in section 1, section 3 sets up special prohibitions [fol. 26] as to the particular offenses therein described and attaches to them also the criminal penalties therein provided." (Italics supplied.)

See H. Rep. No. 2951, 74th Cong. 2d sess. p. 8 (80 Cong. Rec. pp. 9414-9415).

tion of the Robinson-Patman Act. These include soft drinks, coffee, flour, butter and other household staples. It is then alleged that when these items are advertised at unreasonably low prices, to attract large numbers of customers, this has a tendency to destroy competition, and it is alleged that defendant's competitors could not afford to sell such items at unreasonably low prices over a period of time, and remain in business. It is stated that said unreasonably low prices extended over a period of more than six months, with the knowledge and intent on the part of the defendant that such action would destroy a number of its smaller competitors in Albuquerque, and that as a proximate result of the alleged illegal action of the defendant, a number of defendant's competitors, including the plaintiff, were destroyed. They specifically allege that the bankrupt Thompson suffered a loss of business and profits in the years 1954 and 1955 to his damage in the sum of Twenty Thousand Dollars ($20,000.00), and further, as a proximate result of defendant's alleged illegal actions, Thompson became insolvent, became bankrupt, and lost his grocery business to his damage in the amount of Twenty-five Thousand Dollars ($25,000.00).

The defendant's Motion to Dismiss plaintiff's First Amended Complaint is based on the following grounds, first, that the First Amended Complaint fails to state a claim upon which relief can be granted, in that it does not contain a short and plain statement of the claimants, showing [fol. 11] plaintiff entitled to relief as required by Rule 8 (a) of the Federal Rules of Civil Procedure; second, that the Amended Complaint fails to state a claim on which relief can be granted, in that it did not allege sufficient facts with particularity to state a violation of Section 3 of the Robinson-Patman Act (15 U. S. C. A. 13a); third, that the Amended Complaint fails to state a claim upon which relief can be granted, and fails to establish the jurisdiction of this Court over the subject matter of this action, for the reason that the Complaint does not concern transactions, occurrences or activities taking place in the course of interstate commerce and within the scope of Section 3 of the Robinson-Patman Act, supra; fourth, the Amended Complaint fails to state a claim on which relief can be granted under Section 3 of the Robinson-Patman Act, supra, for

the reason that Title 15, U.S.C.A., Section 13 a, is unconstitutional, being so vague and indefinite, that it violates the Fifth and Sixth Amendments to the Constitution of the United States, having no reasonable relation to the anticipated evil, and constituting an unreasonable interference with freedom of contract, as guaranteed by the Fifth Amendment to the Constitution of the United States; fifth, that the Amended Complaint fails to state a claim upon which relief can be granted under Section 3 of the Robinson-Patman Act, for the reason that said section is not one of the "Anti-Trust Laws", within the purview of Section of the Clayton Act (15 U.S.C.A., Section 15), and no private right of action for violation of said section exists under any laws of the United States; sixth, the Amended Complaint fails to state a claim upon which relief can be granted, under Section 3 of the Robinson-Patman Act (Title 15, U.S.C.A., Section 13a), for the reason that said Complaint fails to allege facts establishing a violation of Section 3 of the Robinson-Patman Act, or facts demonstrating injury to plaintiff's business or property on account of an alleged violation of said section.

The grounds dispositive of this cause of action in its present status, will be taken up in the order of their importance.

It has been deemed best to formulate appendices to this Opinion, wherein can be contained the various statutes in dispute, together with pertinent references to actions taken [fol. 12] on Congressional bills by the Senate, the House of Representatives and committees thereof. By so doing, needless excerpts from the Statutes and from Congressional proceedings can thus be avoided.

Little need be said, relative to the Motions to Strike and Make Definite and Certain, in view of the disposition hereinafter made of the cause on the Motion to Dismiss. Suffice it to say, if this cause be eventually tried upon its merits, the issues to be submitted to a Jury, which has already been demanded herein, can be delineated with precision at a Pre-Trial Conference, and thereby improper allegations can be deleted from any submission of the cause to a Jury. Likewise, by means of Pre-Trial Conferences, by Discovery (Rules 26 through 37), and by adherence to the suggestions contained in "Short Cuts in Long Cases", 13 Fed. Rules

Decisions, page 42, et seq., pertinent information should be acquired by all of the parties hereto, so that a full presentation of all the ramifications of this cause can be had.

Passing, now, to the Motion to Dismiss, the Court passed upon the three grounds therein, which were strenuously argued, orally, before the Court, namely, that the Court lacks jurisdiction of the subject matter of this action; that section 3 of the Robinson-Patman Act is unconstitutional, and lastly, that a private litigant has no right to maintain a treble damage action for violation of Section 3 of the Robinson-Patman Act. Defendant contends that Section 3 of the Robinson-Patman Act specifically requires that the action constituting violations thereof, must occur "in the course of commerce", and that the Act is specifically limited to things done in the course of commerce, and has no application to purely intra-state transactions, citing Myers vs. Shell Oil Co., 96 F. Supp. 670, and Standard Oil Co. vs. Federal Trade Commission, 345 U.S. 231. Defendant emphasizes in this regard that all of the sales involved in this case were at retail from the Safeway markets to the home consumer.

It is true that under the doctrine of Schechter vs. U.S., 295 U. S. 495, Atlantic Co. vs. Citizens Ice & Cold Storage Co., 178 F. (2) 453, and Ewing-von Allmen Dairy Co. vs. C. & C. Ice Cream Co., 109 F.(2) 898, and Federal Trade Commission vs. Bunte Bros., Inc., 312 U. S. 349, together [fol. 13] with many other cases of similar tenor, retail sales are considered solely as intra-state transactions. We are nevertheless confronted with the holding and the language in Moore vs. Meads Fine Bread Co., 348 U. S. 115; decided by the Supreme Court of the United States in December, 1954.

The plaintiff strongly urges that the merchandising policies, from those of broad national concept down to the specific pricing of individual items of food, are conceived and executed at defendant's division headquarters in El Paso, Texas, and at its Oakland, California, offices, and that the local operator of the defendant's public markets merely follows to the last detail, the comprehensive plans made beyond the boundaries of this district. This contention of the plaintiff must be regarded as true, for

the purposes of the instant Motion, and in view of this strenuous contention, and the language in the Mead Bread case, supra, this Court is loathe to rule upon this ground at this stage of the proceedings, and hence will reserve ruling thereon, until some future proceeding in this cause. The Court does not wish to have this ruling be regarded as a direct overruling of this ground, lest it be regarded as "the law of the case".

We pass, now, to the second ground, that Section 3 of the Robinson-Patman Act is unconstitutional. The challenged statute appears as Section 3 of the Robinson-Patman Act first set forth in the appendix hereto. Defendant contends that this section is so vague, indefinite and uncertain that an accused cannot determine in advance, with reasonable certainty, what conduct on its part might be claimed to violate that section's provisions. In support of its motion, defendant has cited and argued the cases of Connally vs. General Construction Co., 269 U.S. 385, U.S. vs. Cohen, Grocery Co., 255 U.S. 81, Musser vs. Utah, 333 U.S. 95, and Cline vs. Frink Dairy Co., 274 U.S. 445. A thorough study of the statute in question, and the authorities pertinent thereto, have implanted in the Court's mind grave doubts as to the constitutionality of Section 3 of the Robinson-Patman Act, Title 15 U.S.C., Section 13a. A sound application of the canons of constitutional law, however, makes it improvident for this Court to rule upon this issue at this stage of the proceedings. It is a general principle of consti- [fol. 14] tutional law, that Courts will not pass on the constitutionality of an Act of the Legislature, if the merits of the case may fairly be determined otherwise, without so doing. See Flint vs. Stone Tracy Co., 220 U.S. 107; Wright vs. Vinton Mountain Trust Bank, 300 U.S. 440, and Crowell vs. Benson, 285 U.S. 22. Stated differently it may be said that a court will pass upon the constitutionality of law only when necessary to the determination upon the merits of the case under consideration. See Ohio River Co. vs. Dittey, 232 U.S. 576; Southwestern Oil Co. vs. Texas, 217 U.S. 114, and Marvin vs. Trout, 199 U.S. 212.

Inasmuch as the Court's ruling as hereinafter discussed is to the effect that Title 15, U.S.C.A., Section 13a is a criminal statute, only, and does not afford a private litigant an action for treble damages for violation thereof, no neces-

sity appears for a direct holding as to the constitutionality of such statute. For this reason, the Court will resist the allure of proceeding further under this phase of the case, will reserve ruling on that point, and will now proceed to the ground which the Court holds disposes of the matter presented to the Court.

In holding as it does, that a private litigant has no right to maintain a treble damage action for violation of Section 3 of the Robinson-Patman Act, 15 U.S.C. 13a, the Court does so after recourse to Vols. 79 and 80 of the Congressional Record, the Committee Reports pertaining to the Robinson-Patman Act, and the Borah-Van Nuys bill, and a reference to Vol. 38, U. S. Statutes at Large, 730, et seq., and 49 U. S. Statutes at Large, pages 1526, et seq.

A summary of the legislative history of the statutes under consideration in this case is set forth in the third part of the appendix to this opinion, and reference may be had thereto for the factual background upon which the Court's decision is, to some extent, predicated. It should be pointed out that unnecessary confusion is presented to any person checking the United States Code or U. S. Code Annotated, by reason of the method adopted by the codifiers in labeling the Acts in question. Sections 1 and 2 of the Robinson-Patman Act are set forth respectively in Title 15, U.S.C. as sections 13 and 21a, while Section 3 thereof is labeled [fol. 15] "13a". This confusing numbering of the Statutes accounts, in the Court's opinion, for much of the confusion appearing in previous decisions seeking to construe these important Acts of Congress. I feel that the Bench and the Bar have, in times past, been led into error by reason of this method of codification, and may account for some of the opinions now existing in our law reports.

As a starting premise, we may assume that private litigants have no right of action under the Anti-trust laws, unless the right is specifically created and granted by Congress. 15 U.S.C. 15 provides, in effect, that any person injured in business by reason of anything forbidden in the Anti-trust laws, may sue therefor in any District Court of the United States, and shall recover triple damages, costs of suit and a reasonable attorney's fee. In order to determine the meaning of the words "Anti-trust laws", one must look at that section of Title 15 U. S. Code, defining the

words used therein. Referring, first, to Section 12 of Title 15, U. S. Code, we find that "Anti-trust laws", as used in Section 15 of said Title, include sections 1 to 27 of Title 15. Were one to stop at this stage of legal research, the immediate result would be that one would be convinced that Title 15, U.S.C., Section 13a, being included between Sections 1 and 27 of Title 15, is an Anti-trust law, the violation of which would give rise to a triple damage action on the part of an injured competitor. The codifiers state as the source of Section 12, Title 15, U.S.C.A., Chapter 323, Section 1, 38 Stat. 730, approved October 15, 1914. A portion of Section 1 of Chapter 323 of the Statutes at Large last above cited, is set forth in the Appendix. It will be noted that the Anti-trust laws therein defined, relate by title and date, to the Sherman Act, the Clayton Act, amendments to each of the said Acts, and to a certain taxation act, all enacted prior to October 15, 1914. This section has never been amended by Congress, and hence, we must construe and limit the definition of "Anti-trust laws", to those laws specifically enumerated in the 1914 Statutes and such subsequent Acts of Congress as amend any of the Acts specifically therein enumerated. To do otherwise would constitute Judicial legislation, and would be an affront to one of the three coordinating and separate branches of our National Government.

A close examination of the Robinson-Patman Act, as it [fol. 16] appears in 49 Stat., pages 1526 to 1528, conclusively shows the Clayton Act was amended, and only amended by Section 1 of the Robinson-Patman Act. The enacting clause of Chapter 592 of the 74th Congress provides that Section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1954, as amended (U.S.C., Title 15, Section 13), is amended to read as provided in Section 1 of the Robinson-Patman Act. Said Section 2 is preceded by quotation marks, which continue until the end of Section 1 of the Robinson-Patman Act. Section 2, regarding pending litigation, Section 3 being the Act upon which plaintiff Vance seeks damages herein, and Section 4 being a exclusion of cooperative associations, do not purport to be amendatory of any then existing Anti-trust Act. Congress does not appear to even have attempted to so

amend exising Anti-trust Acts, and such an intent should not be implied by those of us whose duty it is to construe Congressional Statutes.

I take it that no authority need be cited as to our right to go behind the codifications of our Federal laws. 1 U.S.C.A., page 4, states, in effect, that the matters set forth in the Code shall establish prima facie, the laws of the United States which are general and permanent in nature, but, nothing in the Act authorizing the codification shall be construed as repealing or amending any such law, or as enacting as new law, any matter contained in the Code. It is then provided that in case of any inconsistencies arising through omission or otherwise, between the provisions of any of the sections of the Code, and the corresponding portions of the legislation theretofore enacted, effect shall be given for all purposes whatsoever, to such enactments.

When Congress creates a new offense and sets forth the penalty which the Court concludes Congress did, as to Title 15, U.S.C. 13a, the penalty so provided, in this case a criminal penalty, is exclusive. See Wilder Mfrg. Co. vs. Corn Products Refinery Co., 236 U.S. 165; State of Minn. vs. Northern Securities Co., 194 U.S. 48; U. S. vs. Cooper Corp., 312 U.S. 592, and Paine Lumber Co. vs. Neal, 244 U.S. 459.

This point of law has never received the specific attention of the Supreme Court of the United States. It was urged by the plaintiff that the decision of that tribunal in the [fol. 17] Meade Bread Case, supra, is authority for the proposition that a private litigant has a right for damages in a civil action. A study of the court file in this district, where that cause arose, a study of the transcript on appeal, and many readings of Mr. Justice Douglas' opinion all point to the conclusion that never once, by direction or indirection, was this issue brought to the attention of the trial court, the U. S. Court of Appeals, nor of the Supreme Court of the United States. This issue has received the attention of several U. S. Districts Courts, and at least one U. S. Court of Appeals. In the case of National Used Car Market Report, Inc. vs. National Auto Dealers Association, 108 F. Supp. 692 (D.C. D.C., 1951), in dismissing a complaint under Section 3 of the Robinson-Patman Act, the court stated "The court is inclined to the view that no action for

damages or injunction is maintainable under the section in question." The Court of Appeals of the District of Columbia, in affirming that decision in the case of National Used Car Market Report vs. National Auto Dealers Association, 209 F. (2) 359, apparently approved of the lower court's ruling that no civil action is available to a private litigant. To be sure, the matter was not extensively presented in the opinion of either court, but this Court is convinced that the rule of the Court of Appeals for the District of Columbia is that no action for damages exists in a private individual, and that that court is in harmony with the instant decision.

In the case of Hershel Calif. Fruit Products Co. vs. Hunt Foods, 119 F. Supp. 603, the court expressed grave doubts as to whether Section 3 of the Robinson-Patman Act is one of the Anti-trust laws, so as to provide a private right of action for its violation. This opinion is apparently shared by contributors to Law Review articles. See 50 Harvard Law Review, pages 406, 121 and 122. Werne "Business and the Robinson-Patman Law." See; also, 85 Univ. of Pa. Law Review, 306; 22 Wash. Univ. Law Quarterly 153, and 22 Amer. Bar Association Journal 539, at page 649, Note 14. Another non-judicial opinion, which harmonizes with this decision, is that of the Attorney General's National Committee to Study the Anti-trust Laws; in its report dated March 31, 1955 at page 200, it is stated:

"We believe that acceptance of Section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support [fol. 18] neither in the legislative intent nor overall anti-trust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all, should be accessible only to the Government which has already sought to limit its application."

The decisions reaching an opposite conclusion have *have* been collected and set forth by U. S. District Judge Yankwich in the case of Ballian Ice Cream Co. vs. Arden Farms Co., 94 F. Supp. 796 (1950). I realize that Judge Yankwich is an able Jurist with considerable experience in

Anti-trust law, both prior to his ascendency to the Federal Bench; and during his tenure thereof. In spite of this, I disagree with him, and herein hold directly contra to that Jurist. An analysis of the authorities upon which he apparently relied; and which he sets forth in the Ballian Ice Cream Co. case, demonstrates that they either do not involve Section 3 of the Robinson-Patman Act at all, or involve said Statute, together with various sub-sections of Title 15 U.S.C. 13(a). As I remember it, some eight cases are cited in the Ballian case, but if said number were quadrupled, those cases would not change my deep-set conviction, which is my ruling herein, that Title 15, U.S.C. 13a, is a criminal statute only, and that a private litigant has no right of action for damages for an alleged violation thereof.

The defendant will submit an Order in conformity with this Opinion by January 31, 1956.

Waldo H. Rogers, United States District Judge.

APPENDIX "A" TO OPINION

The Robinson-Patman Act

[Public—No. 692—74th Congress]

[H. R. 8442]

An Act

To amend section 2 of the Act entitled "An Act to sup-
[fol. 19] plement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., Title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., Title 15, sec. 13), is amended to read as follows:

"Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce,

either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof of the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in [fol. 20] restraint of trade; And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on com-

plaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation this section, and unless justification shall be affirmatively shown, the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchase or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or [fol. 21] commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any serv-

ices or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

SEC. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on Section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: Provided, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this amendatory Act, or is committing, using, or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon, the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as [fol. 22] amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter, the provisions of section 11 of said Act of October 15, 1914, as to review

and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully as to the same extent as if such supplementary proceedings had not been taken.

SEC. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

SEC. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Approved, June 19, 1936.

[fol. 23] APPENDIX "B" TO OPINION

Section 1 of the Clayton Act, Chapter 323, section 1, 38 Stat. 370, reads as follows:

"That 'antitrust laws' as used herein includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', of August twenty-seventh, eighteen hundred and ninety-four; an Act, entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved February twelfth, nineteen hundred and thirteen; and also this act."

Chap. 323, Section 1, 38 Stat. 730.

APPENDIX "C" TO OPINION

Legislative History of Section 3, Robinson-Patman Act

An analysis of the legislative history of Section 3 of the Robinson-Patman Act shows that it was a separate criminal statute known as the Borah-Van Nuys Bills, which was introduced in the Senate on May 4, 1936, some eight months after the Robinson and Patman Bills were presented to the House and Senate.

The Borah-Van Nuys measure was attached to the Robinson Bill (No. 4171), in the Senate as a Floor Amendment, but not as an amendment to the Clayton Act, and became Section 3 of the Robinson Bill. (80 Cong. Rec. 6349).

The phraseology of the Borah-Van Nuys measure was unchanged from the time of its introduction to the time of its enactment. Its provision is almost identical in wording with the Canadian Price Discrimination Act, which is a part of the Canadian Criminal Code, (25-26 Geo. V. Chap. 56 Section 9 (Canada 1935)).

[fol. 24] The Patman Bill was passed by the House on

In the form in which it was finally enacted the Robinson-Patman Act represents an amalgamation of a series of legislative proposals originating with the Patman bill introduced by Representative Patman on June 11, 1935 (79 Cong. Rec. 9081). Joint hearings were held beginning on July 10, 1935, and extending through the last session of the 74th Congress on the Patman bill and also on H. R. 4995 and H. R. 5062, introduced by Representative Mapes. Unable to reach a conclusion on the basis of its first hearings, the committee entrusted further hearings to a subcommittee headed by Representative Utterback. Prior to reconvening his subcommittee in February, 1936, Mr. Utterback had introduced his own bill (H. R. 10486), some features of which were ultimately incorporated in the Patman bill. On March 31, 1936, the House Committee favorably reported the Patman bill in considerably modified form.

Consideration in the Senate was somewhat less extended. On June 26, 1935, shortly after the introduction of the Patman bill in the House, Senator Robinson introduced an identical measure, S. 3154 (79 Cong. Rec. 10129), in the Senate. No hearings were ever held on this measure. On February 3, 1936, the Senate committee on the Judiciary favorably reported the Robinson bill with substantial amendments.

In the meantime on January 16, 1936, Senator Borah had introduced a bill, S. 3670, likewise designed to prohibit price discrimination (80 Cong. Rec. 461), and on January 30, 1936, Senator Van Nuys introduced a similar measure, S. 3835 (80 Cong. Rec. 1194). On March 4, Senators Borah and Van Nuys consolidated their bills in a single measure, S. 4171 (80 Cong. Rec. 3204), on which a subcommittee of the Senate committee on the judiciary held hearings. No report was ever made on these measures. In addition Senator Copeland had introduced two similar measures, S. 4024 and S. 4275. No committee action was taken on these. When the Robinson bill came to a vote in the Senate on April 23 and 24, the Borah-Van Nuys measure was attached to it [fol. 27] as a floor amendment, but not as an amendment to the Clayton Act, and became Section 3 of the Robinson bill (80 Cong. Rec. 6349).

The Patman bill was passed by the House on May 28,

1936, and it and the Robinson bill went to conference. After a short conference, the conference committee reported a revised draft on June 8, 1936, incorporating the Borah-Van Nuys Amendment as Section 3. This revised draft was eventually enacted by Congress and approved by the President in the form hereinbefore set forth in Appendix "A" hereof, as extracted from 49 Stat. 1526.

In United States District Court for the District of New Mexico

Election of Plaintiff Not To Amend First Amended Complaint—Filed March 8, 1956

Comes now Plaintiff and respectfully states to the Court that it hereby elects not to amend Plaintiff's First Amended Complaint, and Plaintiff states that he desires to stand upon the allegations of such First Amended Complaint.

Dated this 24th day of February, 1956.

Nordhaus & Moses, By Donald B. Moses, Attorneys for Plaintiff.

In United States District Court for the District of New Mexico

Order Dismissing First Amended Complaint—March 8, 1956

The Court having heretofore entered its order, and having ordered, adjudged and decreed in the following words: "that Plaintiff's Complaint herein be and the same is dismissed upon the ground above stated", and having further ordered in the words as follows: "that Plaintiff be and he hereby is granted thirty (30) days from the entry hereof to amend his complaint", and it appearing that the Court in such order in each instance was referring to Plaintiff's "First Amended Complaint", and not to Plaintiff's "Complaint", and it further appearing to the Court that the Plaintiff has filed herein his election to stand upon his First

Amended Complaint and to file no amended Complaint herein, and it further appearing that a Notice of Appeal has been filed herein, and that such Notice of Appeal should [fol. 28] be stamped with a new filing date by the Clerk of this Court and considered as a Notice of Appeal directed at the entry of this Order, and the Court being fully advised in the premises, Finds:

That Plaintiff's First Amended Complaint should be dismissed.

Now, Therefore, It Is Ordered, Adjudged and Decreed that Plaintiff's First Amended Complaint and this cause should be, and the same are hereby dismissed.

It Is Further Ordered that the Clerk in this Court be and he is hereby authorized and directed to re-stamp a filing date on the Notice of Appeal heretofore filed herein as of the date of the entry of this Order of Dismissal, and that the said Notice of Appeal should be considered for all purposes as being directed against this Order.

Waldo H. Rogers, District Judge.

Submitted: John B. Tittmann Atty for Defts. Submitted Donald B. Moses Atty for Plaintiff.

In United States District Court for the District of New Mexico

Notice of Appeal—Filed February 14, 1956

Notice is hereby given that Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, Plaintiff in the above entitled cause, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the order dismissing Plaintiff's Complaint entered in this action on January 18, 1956.

Dated this 14th day of February, 1956.

Nordhaus & Moses, By Robert J. Nordhaus, Attorneys for Appellants.

Filed Feb. 14, 1956. Re-filed by order of Court March 8, 1956.

[fol. 29] [By order of April 3, 1956, the time for docketing the cause in the Court of Appeals was extended to April 7, 1956.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 30] In United States Court of Appeals for the Tenth Circuit

[Caption omitted]

[fol. 31] Minute Entry of Argument and Submission—September 5, 1956

(Omitted in printing)

[fol. 32] In the United States Court of Appeals for the Tenth Circuit—September Term, 1956

No. 5366

Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, Appellant,

v.

Safeway Stores, Incorporated, a corporation, Appellee.

Appeal from the United States District Court for the District of New Mexico

Opinion—November 6, 1956

Robert J. Nordhaus, Albuquerque, New Mexico, (Nordhaus & Moses), for Appellant.

John B. Tittmann, Albuquerque, New Mexico, (W. A. Keleher, Albuquerque, New Mexico; Douglas Stripp, and

Watson, Ess, Marshall & Enggas, all of Kansas City, Missouri, were with him on the brief), for Appellee.

Before Huxman, Murrah and Pickett, Circuit Judges.

PICKETT, Circuit Judge:

[fol. 33] The Trustee in Bankruptcy for Frank Melvin Thompson brought this action against Safeway Stores, Inc., to recover treble damages under § 3 of the Robinson-Patman Act, (15 U.S.C.A. § 13a).[1] The complaint is based solely upon violations of the second and third clauses of § 3, wherein it is alleged that Safeway made sales at unreasonably low prices and territorial discrimination in prices for the purpose of injuring competition to the damage of Thompson, who at the time was in the retail grocery

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[1] § 13a reads as follows:

"Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both. June 19, 1936, c. 592, § 3, 49 Stat. 1528."

business in Albuquerque, New Mexico. It suffices to say that the allegations, if true, constituted violations of § 3. The trial court expressed doubt as to the constitutionality [fol. 34] of § 3, but chose to ease its conclusion on a holding that the section was no part of the antitrust statutes of the United States, and dismissed the action on the ground that a civil action for treble damages was not available to a private litigant under 15 U.S.C.A. § 15. We do not agree with this conclusion.

15 U.S.C.A. § 15 was included in the Clayton Act (38 Stat. 730), and provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, * * *" together with reasonable attorney's fees and costs. The Clayton Act defined "antitrust laws" as designated statutes existing at the time. Upon codification this section became 15 U.S.C.A. § 12, and defined "antitrust laws" as section 1-27 of Title 15. It is contended that § 13a was not one of those antitrust laws as defined in § 1 of the Clayton Act and the codifiers could not amend the law by including it in § 12. This is no doubt true if § 3 is a separate act. The code is only prima facie evidence of the law, and the language of the original statute controls. Act creating U.S. Code, U.S.C.A. Vol. 1, p. 4; Stephan v. United States, 319 U.S. 423; Murrell v. Western Union Tel. Co., 5 Cir. 160 F. 2d 787. If, however, § 3 is in fact an amendment to the Clayton [fol. 35] Act, it was properly designated in the codification. To be an amendment to an existing law, the statute need not be so labeled. A law is amended when it is permitted to remain and something is added or taken from it or is in some way changed or altered to better accomplish its purpose. United States v. Lapp, 6 Cir., 244 Fed. 377; Balian Ice Cream Co. v. Arden Farms Co., 94 F. Supp. 796.

In holding that §3 was not an amendment to the Clayton Act but a separate Act for which a civil remedy was not available to the plaintiff under §15, the trial court relied to a large extent upon the legislative history of the Act. Safeway here insists that the history sustains the trial court, while the Trustee maintains the opposite view. We think a study of the committee reports, the discussions and

debates on the Robinson-Patman Act, both in the House and Senate, leads to the conclusion that it was generally understood at the time that §3 of that Act was supplementary and amendatory of the antitrust laws and that in addition to the criminal sanctions, an injured party could recover treble damages under the provisions of the Clayton Act. The Act dealt exclusively with the subject matter of the existing antitrust laws. It was a continuation of the Con- [fol. 36] gressional attack upon the evils of combinations, monopolies and restraints of trade and commerce designed to stifle competition. In each instance "Congress was dealing with competition which it sought to protect, and monopolies which it sought to prevent". Standard Oil Co. v. United States, 340 U.S. 231, 249; Staley Mfg. Co. v. Federal Trade Commission, 7 Cir., 135 F.2d 453. The title to the Act states that it is an act to amend §2 of the Clayton Act, and for other purposes, but the enacting clause recites only that §2 "is amended to read as follows:" and the entire Robinson-Patman Act follows, although the first section, designated as §2, is in quotation marks, while the last three sections are not. We do not think that failure to include the last three sections in quotation marks has the significance which the trial court gave to it, because these sections are not referred to in any other manner than in the enacting clause. Without specific language excluding these three sections from the enacting clause, we feel constrained to hold that they are included thereunder and must be considered as amending the Clayton Act.

In Balian Ice Cream Co. v. Arden Farms Co., supra, Judge Yankwich, in a thorough and painstaking review of antitrust legislation and the authorities, concluded that §3 was an amendment of the Clayton Act and upheld the right [fol. 37] of a private litigant to sue for treble damages under §15. We adopt the reasoning and conclusions reached in that case. Generally the courts which have had occasion to consider the question have agreed that the recovery of treble damages was available to private litigants for violation of §13a. Atlanta Brick Co. v. O'Neal, (D.C.E.D. Tex.) 44 F.Supp. 39; A. J. Goodman & Son v. United Lacquer Mfg. Corp., (D.C. Mass.) 81 F.Supp. 890; Spencer v. Sun Oil Co. (D.C. Conn.) 94 F.Supp. 408; Myers v. Shell

Oil Co. (D.C.S.D. Calif., Cen. Div.) 96 F. Supp. 670; Hershel Calif. Fruit Prod. Co. v. Hunt Foods, (D.C. N.D. Calif. S.D.) 119 F.Supp. 603, appeal dismissed 9 Cir., 221 F.2d 797. In National Used Car Market, Inc., v. Nat'l. Auto Dealers Ass'n. (D.C., D.C.) 108 F.Supp. 692, the District Court was inclined to the view that §3 did not provide a civil remedy for damages, but did not so hold. The action was dismissed on other grounds and affirmed, 209 F.2d 359.

Although it was not necessary to a decision in the case, the Supreme Court, in Bruce's Juices, Inc., v. American Can Co., 330 U.S. 743, 750, had this to say:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction [fol. 38] a violator may be fined or imprisoned. 49 Stat. 1528, 15 U.S.C. §13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. 38 Stat. 731, 15 U.S.C. §15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."

Considering the result in Moore v. Mead's Fine Bread Co., 10 Cir., 184 F.2d 338, vacated and remanded 340 U.S. 945, and 208 F.2d 777, reversed 348 U.S. 115,[2] and what was

[2] In the Mead Bread case, as in this case, the plaintiff sought treble damages for violations of §13a. We first sustained a dismissal of the complaint. Upon mandate from the Supreme Court, this judgment was vacated and the case was tried to a jury which returned a verdict in favor of Moore for treble damages. We reversed and remanded with instructions to enter judgment for the defendant. The Supreme Court reversed and affirmed the judgment of the District Court. Although the question here was not raised, the court held that violations of §13a were "included within the scope of the antitrust laws" with the right to treble damages, even though the victim is a local resident and no interstate transactions were used to destroy it.

said in the Bruce's Juices case, without further word from the Supreme Court, we would be extremely hesitant to hold [fol. 39] that a valid judgment for treble damages could not be had for violations of §13a.

Reversed.

[fol. 40] In United States Court of Appeals for the Tenth Circuit

Judgment—November 6, 1956

Before Honorable Walter A. Huxman, Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, appellant, have and recover of and from Safeway Stores, Incorporated, a corporation, appellee, his costs herein and have execution therefor.

[fol. 41] [File endorsement omitted]

In United States Court of Appeals, for the Tenth Circuit

[Title omitted]

Petition for Rehearing—Filed November 26, 1956

Comes now the appellee in the above styled and numbered cause, by its attorneys, and respectfully petitions the Court for a rehearing in this cause, and in support thereof shows to the Court as follows:

On November 1, 1956, just six days prior to the decision by the Court in this case, the Court of Appeals for the Seventh Circuit, in the case of *Nashville Milk Company* vs.

Carnation Company, No. 11820, decided the same issue contrary to the decision of the Court in this case, holding that a private action may not be maintained for violation of Section 3 of the Robinson-Patman Act, which decision and opinion were not available to this Court in reaching its decision.

It is respectfully submitted that this Court may wish to reconsider its decision and opinion in this cause, in the light of the reasoning and authorities contained in the opinion of the Seventh Circuit in the case of *Nashville Milk Company* vs. *Carnation Company*, a copy of which is attached hereto.

It is hereby certified that the within petition for a rehearing is filed in good faith and not for the purpose of delay.

Wherefore, appellee prays that a rehearing be granted in this cause.

W. A. Keleher, John B. Tittman, Albuquerque, New Mexico and Douglas Stripp, Kasas City, Missouri, Attorneys for Appellee.

Of Counsel: Watson, Ess, Marshall & Enggas, 1500 Dierks Building, Kansas City, Missouri.

[fol. 42] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, SEPTEMBER TERM AND SESSION, 1956

No. 11820

NASHVILLE MILK COMPANY, Plaintiff-Appellant,

v.

CARNATION COMPANY, Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Western Division

November 1, 1956.

Before Duffy, Chief Judge, and Major and Schackenberg, Circuit Judges

DUFFY, Chief Judge:

This is an appeal from an order dismissing the complaint herein before trial. This action was brought under Sec. 3

of the Robinson-Patman Act (Sec. 13a, Title 15 U.S. Code). Plaintiff sought to recover treble damages and asked injunctive relief claiming defendant had sold filled milk at unreasonably low prices for the purpose of destroying competition by plaintiff in its sale of a like product.

Plaintiff is an Illinois corporation, and since April, 1951, has manufactured and sold filled milk within the State of Illinois where such manufacture and sale is legal under the laws of Illinois. Defendant is a Delaware corporation which owns and operates some 30 factories in 20 states for the processing of milk.

Since May, 1952, defendant has manufactured filled milk at its factory located at Morrison, Illinois. For the purpose of manufacturing filled milk defendant has transported or caused to be transported into Illinois whole milk from the State of Wisconsin, and vegetable oils from various points outside of Illinois. The filled milk manufactured by Carnation has been marketed under the name "Topic" while Plaintiff's filled milk product was marketed under the name "Rich Whip".

Defendant moved to dismiss the complaint on four grounds. 1) The Robinson-Patman Act does not protect a business engaged in making and selling a product banned by Congress from the channels of interstate commerce; 2) The complaint fails to allege that any sales of filled milk by either plaintiff or defendant were in the course of interstate commerce; 3) The Complaint fails to allege that the manufacture of filled milk by the defendant was in the course of interstate commerce, and 4) A private action may not be maintained for an alleged violation of Sect. 3 of the Robinson-Patman Act.

The District Court dismissed the complaint for the reason that no relief should be accorded to the plaintiff in view of the declared congressional policy relative to filled milk as announced in 21 U.S.C.A. Sec. 62 which proscribes the shipment or delivery for shipment of filled milk in interstate commerce.

The decision of the District Court must be affirmed if the order of dismissal can be sustained on any of the grounds urged by defendant in support of its motion to dismiss. *Gallagher & Speck, Inc.* vs. *Ford Motor Com-*

pany, 7 Cir., 226 F. 2d 728, 731. Inasmuch as we are convinced that a private action may not be maintained for a violation of Sec. 3 of the Robinson-Patman Act, we shall not discuss the other grounds urged by the defendant.

The Supreme Court has not ruled upon this question and as far as we are advised, there has been no direct [fol. 43] decision on the point by any Court of Appeals.[1] There is, however, a direct conflict of authority in the District Courts. The leading case which holds that such a cause of action does exist is *Balien Ice Cream Co., Inc.* vs. *Arden Farms Co., et al.*, 94 F. Supp. 796 (D.C. Calif. 1950). The leading case to the contrary is *Vance* vs. *Safeway Stores*, 137 F. Supp. 841 (D.C. N.Mex. 1956). In the *Vance* case Judge Rogers carefully considered the decision in the *Balien Ice Cream* case and reached the conclusion that it was wrongly decided.

Plaintiff has no right to sue for treble damages or injunctive relief unless a federal statute has created that right. *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 7 Cir. 213 F. 2d 284, 286; *Paine Lumber Company, Ltd., et al.* v. *Neal etc., et al.*, 244 U.S. 459, 471. The only statutes upon which the plaintiff could possibly rely are sections 4 and 16 of the Clayton Act (15 U.S.C. Secs. 15, 26); Section 4 provides that any person injured in his business or property by reason of anything forbidden by the "anti-trust laws" may recover treble damages. Section 16 authorizes private suits for injunctive relief against threatened damage by a violation of the "antitrust laws."

The Clayton Act (38 Stats. 730) defines the term "anti-trust laws" and states precisely what that term means as it is used throughout the Act. Section 1 of the Clayton Act defines "antitrust laws" to mean the Sherman Act (Act of July 2, 1890), the Wilson Tariff Act (Act of August 27,

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[1] Section 3 has been referred to in Supreme Court dicta as though it were a statute under which a private suit for treble damages could be maintained. *Bruce's Juices, Inc.* vs. *American Can Co.*, 330 U.S. 743, 750, and *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 117. However, in neither of these cases was the private right to sue under Section 3 in issue.

1894), the Act amending the Wilson Tariff Act (Act of February 12, 1913) and the Clayton Act itself.

It is quite apparent that confusion has arisen as to whether section 3 of the Robinson-Patman Act is an "antitrust law" within Section 1 of the Clayton Act because of an error in codification in the 1940 U.S. Code. In the 1926 U.S.Code, Section 1 of the Clayton Act was codified (15 U.S.C. Sec. 12) to read: "'Antitrust laws' as used in Section 12-27 of this title (Title 15) includes Sections 1-27 of this title." This was correct because Sections 1-27 of Title 15 were the Sherman Act, the Wilson Tariff Act (as amended) and the Clayton Act. The 1934 Code was the same.

However, in the 1940 Code which followed the passage of the Robinson-Patman Act in 1936, the codifiers only partially recognized that Sections 2, 3 and 4 of the Robinson-Patman Act (codified as 15 U.S.C. Sec. 21a, Sec. 13a and Sec. 13b) were no part of the Clayton Act or any amendments to any of its sections by changing the figures "12-27" in 15 U.S.C. 12 (the codification of Section 1 of the Clayton Act) to 12, 13, 14-21, 22-27" so that the stateute read: "'Antitrust laws' as used in Secs. 12, 13, 14-21, 22-27 of this title includes Sections 1-27 of this title." But the codifiers failed to make a corresponding change in the figures 1-27, with the result upon casual inspection the term "antitrust laws" might seem to include Secs. 2, 3 and 4 of the Robinson-Patman Act. The 1946 and 1952 Codes continued the error.

However, the United States Code is only prima facie evidence of the laws of the United States. In case of inconsistencies between the code and the corresponding legislation theretofore enacted, effect is to be given to the enactments themselves. 1 U.S.C. p. 4; *Stephan* vs. *United States*, 319 U.S. 423, 426.

Because Section 1 of the Robinson-Patman Act is without question an amendment of the Clayton Act, it has been argued that Section 3 is also such an amendment. A close examination of the text of the Robinson-Patman Act and of its legislative history convinces us that Section 3 is not an amendment of the Clayton Act.

[fol. 44] The first section of the Robinson-Patman Act begins with this statement: "Be it enacted * * * that Sec.

2 of (the Clayton Act) is amended to read as follows:". No such statement appears at the beginning of Sections 2, 3 or 4 of the Robinson-Patman Act. These sections do not purport to amend as Section 1 specifically did.

Immediately following the enacting clause, Section 1 continues with the text of subsections (a) through (f) each subject being enclosed in quotation marks so as to show how the amended Section 2 of the Clayton Act is to read. There are no quotation marks enclosing any of the remaining sections. This omission of quotation marks is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress in the United States. Illustrations of the practice of enclosing in quotation marks that portion of the bill which amended other laws can be seen in such legislation as Chapter 634, 49 Stat. 1555 relating to the Migratory Bird Act; Chapter 811, 49 Stat. 1925, relating to Naturalization Laws, and Chapter 816, 49 Stat, 1930, relating to Welfare of American Seamen, in each of which quotation marks enclose the portions of those bills which amended existing law while quotation marks were omitted for those portions of the bills which were not amendments.

The legislative history is convincing that there was no intention by Congress for Section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act. Senator Robinson and Representative Patman had introduced their bills in the Senate and House, respectively. About eight months later a bill known as the Borah-Van Nuys Bill was introduced into the Senate. This provided for a criminal statute. Later, the Borah-Van Nuys Bill was attached to the Robinson Bill in the senate by a floor amendment. The phraseology of the Borah-Van Nuys measure remained unchanged until its enactment as Section 3 of the Robinson-Patman Act.

After the passage of the Patman bill in the House and the Robinson bill in the Senate, these bills went to a conference. The Conference Committee reported a revised draft on June 15, 1936, which incorporated the Borah-Van Nuys measure as Section 3 (80 Cong. Rec. 9414). The report of the Conference Committee (80 Cong. Rec. 9414, 9902)

expressly stated that only Section 1 was an amendment of the Clayton Act. The report stated:

"Section 2

"The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as Section 2 of the bill itself, rather than as part of the *amendment to Section 2 of the Clayton Act, which is provided for in Section 1 of the present Bill.*" (Emphasis supplied)

Section 3

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and * * * appears in the conference report as Section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S.4171). *While they overlap in some respects*, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in Section 1.*" (Emphasis supplied).

Representative Utterback, Chairman of the House Members of the Joint Conference Committee, stated in his report to the House (80 Cong. Rec. 9419): "Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the [fol. 45] scope or operation of the prohibitions or limitations laid down by *the Clayton Act amendment provided for in Section 1.*" (Emphasis supplied)

Representative Miller, one of the House conferees of the Joint Conference Committee, stated (80 Cong. Rec. 9421): "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here *amends section 2 of the Clayton Act.*" Mr. Miller, when asked whether section 3 was "a part of the same act" as the part of the bill amending the Clayton Act replied (80 Cong. Rec.

9423): "Of course it is, *but it is not a part of the Clayton Act.* * * *." (Emphasis supplied).

Writers of law articles on the subject here for decision have taken the position that no action may be maintained for treble damages under section 3 of the Robinson-Patman Act: 50 Harvard Law Review 106, 121-122; 85 University of Pennsylvania Law Review, 306, 312; 22 Washington Law Quarterly, 153, 159, 182; 22 American Bar Association Journal, 593, 649.

The Attorney General's National Committee to Study the Antitrust Law said, on page 201 of its report of March 31, 1955:

> "We believe that acceptance of section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support neither in the legislative intent or overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all should be accessible only to the government which has already sought to limit its application."

As we have reached the conclusion that a private action may not be maintained for a violation of Section 3 of the Robinson-Patman Act, it follows that the District Court was correct in dismissing the complaint and the order and judgment of dismissal must and is affirmed.

[fol. 46] CERTIFICATE OF COUNSEL—Filed November 26, 1956

The undersigned, one of the attorneys for the appellee, hereby certifies that the Petition for Rehearing in this case was filed in good faith, and not for purposes of delay.

John B. Tittmann.

[fol. 47] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER DENYING APPELLEE'S PETITION FOR REHEARING—December 4, 1956

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[By order of December 12, 1956, the mandate of the United States Court of Appeals was stayed for a period of thirty days from December 14, 1956, under provision of paragraph 3 of rule 28.]

[fol. 48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1956

No. 707

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 4, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary calendar. The case is assigned for argument immediately following No. 699.

And it is further ordered that the duly certified copy of the transcript of the proceeding below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

October Term, 1956

No. ~~707~~ 69

SAFEWAY STORES, INCORPORATED,
a corporation,

Petitioner,

vs.

HARRY V. VANCE, Trustee in
Bankruptcy for
FRANK MELVIN THOMPSON, BANKRUPT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT

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STATUTORY PROVISIONS INVOLVED:

CASES CITED:

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Supreme Court of the United States

October Term, 1956

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SAFEWAY STORES, INCORPORATED,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, SAFEWAY STORES, INCORPORATED, a corporation, by its attorneys, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this cause on November 6, 1956.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Mexico is reported in 137 F. Supp. 841, and appears in the certified copy of the record printed

for use in the Court of Appeals, at Pages 8 to 27.* The opinion of the Court of Appeals has not yet been reported, but appears in the record on Certiorari at Pages 3 to 10 and a printed copy thereof is appended to this Petition. No opinion was rendered by the Court of Appeals in denying the Petition for Rehearing.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit, sought to be reviewed, was dated November 6, 1956, and entered on the same date (R-11).

The Petition for Rehearing was filed on November 26, 1956, (R-12) and denied by Order entered December 4 (R-17). On December 12, 1956, an Order was issued staying issuance of the mandate for thirty days from December 14, 1956, pending Petition for Certiorari (R-17).

The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

QUESTION PRESENTED FOR REVIEW

Does Section 3 of the Robinson-Patman Act amend the Clayton Act so as to be one of the "antitrust laws" defined in Section 1 of the Clayton Act, for violation of which Section 4 of the Clayton Act creates a civil treble damage remedy?

*Certified record on certiorari is hereinafter referred to and identified as "R".

Certified copy of the record printed for use in the Court of Appeals is hereinafter referred to and identified as "PR".

STATUTORY PROVISIONS INVOLVED.

The following statutory provisions are involved, and the pertinent parts thereof are quoted herein as follows:

Robinson-Patman Act, Section 3,
49 Stat. 1528, Title 15, USC 13a:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

Clayton Act, Section 4,
38 Stat. 731, Title 15 USC 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-

fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act, October 15, 1914, Chapter 322, Section 1, 38 Stat. 730 (1st paragraph)

"That 'antitrust laws' is used herein includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', of August twenty-seventh, eighteen hundred and ninety-four; an Act, entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved February twelfth, nineteen hundred and thirteen; and also this act."

Title 15 USC 12 (1st paragraph)

"'Antitrust laws,' as used in sections 12, 13, 14-21, and 22-27 of this title, includes sections 1-27 of this title."

STATEMENT OF THE CASE

The judgment of the Court of Appeals sought to be reviewed reversed the judgment of the District Court dismissing the First Amended Complaint (R-11).

The First Amended Complaint charges petitioner with violation of the second and third clauses of Section 3 of the Robinson-Patman Act, 15 USC 13a, by selling goods in one part of the United States at prices lower than those exacted elsewhere in the United States, and by selling goods at unreasonably low prices, all for the purpose

of destroying competition or eliminating competitors. (PR 2-6).

Petitioner filed its Motion to Dismiss on the ground, among others, that Section 3 of the Robinson-Patman Act, 15 USC 13a, is not one of the "antitrust laws" within the purview of Section 4 of the Clayton Act, 15 USC 15, and consequently no private right of action for violation thereof exists under the laws of the United States (PR 6-7). The District Court sustained the Motion to Dismiss on the ground above stated, reserving its ruling on other grounds included in the Motion, and entered its Order dismissing the case on January 18, 1956 (R-8). Said order granted plaintiff thirty days in which to amend, and plaintiff thereafter filed its election not to amend (R-27). The District Court thereupon entered a supplemental order dismissing the First Amended Complaint, and the case (PR 27-28). An appeal was taken from this judgment (PR-28).

The Court of Appeals reversed the order of the District Court, and remanded the case for further proceedings (R-11). The Court of Appeals held that Section 3 of the Robinson-Patman Act, 15 USC 13a was an amendment of the Clayton Act and therefore an "antitrust law" within the meaning of Section 4 of the Clayton Act, 15 USC 15, for violation of which a private litigant had a civil remedy for treble damages for any injury to his property caused by such violation, pursuant to 15 USC 15.

Federal jurisdiction in the court of first instance was based on Title 28 USC 1337.

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision herein is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit

in the case of *Nashville Milk Company* vs. *Carnation Company*, decided November 1, 1956, not yet reported, a copy of the opinion being attached to this Petition as Appendix B.

Both this case and the Carnation case were based upon alleged violations of Section 3 of the Robinson-Patman Act. That section is a criminal statute providing a penalty of $5,000 fine or imprisonment for one year or both.

The Court below, in reversing the decision of the District Court, squarely held that Section 3 of the Robinson-Patman Act was a part of and amendatory to the Clayton Act, and therefore was one of the "antitrust laws" defined in Section 1 of the Clayton Act. Consequently it concluded that Section 4 of the Clayton Act created a private civil remedy for treble damages for violation of Section 3 of the Robinson-Patman Act. The Court below rejected the contention that both the text of the Robinson-Patman Act and its legislative history plainly demonstrated that Section 3 thereof was not an amendment to the Clayton Act and was not so intended. The Court relied upon and adopted the reasoning and conclusions in the case of *Balian Ice Cream Co.* vs *Arden Farms Co.* et al, 94 F. Supp. 796 (DC Calif. 1950). The Court further relied upon the dicta in *Bruce's Juices, Inc.*, vs. *American Can Co.* 330 U. S. 743, 91 L. ed. 1219, 1228, (1946) and the result in *Moore* vs. *Mead's Fine Bread*, 348 U.S. 115, 99 L. ed. 145 (1954). The decision was based primarily upon the assumption that since Section 3 of the Robinson-Patman Act deals with a problem within the general field of antitrust legislation it must be an amendment to and a part of the Clayton Act, so as to be one of the antitrust laws therein defined.

The decision of the Court of Appeals for the Seventh Circuit in the *Nashville Milk* vs. *Carnation Company* case, supra, is diametrically opposed. The Court there sustained

dismissal of the Complaint by the District Court on the sole ground that Section 3 of the Robinson-Patman Act was not an amendment of or part of the Clayton Act, and therefore was not one of the antitrust laws defined in the Clayton Act, for violation ~~of which~~ the civil remedy of treble damage recovery is created.

The Seventh Circuit rejected the reasoning and conclusions reached in the *Balian* case, supra, and followed and relied heavily upon the decision of the District Court in the case at bar. The decision was based upon an analysis of the text of the Robinson-Patman Act and its legislative history, from which the Court concluded that Congress clearly did not intend Section 3 of the Robinson-Patman Act to be a part of or an amendment to the Clayton Act and therefore it was not one of the antitrust laws as defined in that Act. The Court also relied upon the unanimous opinion of legal scholars who have considered the question, as well as the findings of the Attorney General's National Committee to Study the Antitrust Laws. The Court did not consider the dicta in *Bruce's Juices* (supra), nor the result in *Moore* vs *Mead's Fine Bread* (supra), dispositive or persuasive, since the issue was neither raised nor adjudicated in either case.

The conflict is irreconcilable. Section 3 of the Robinson-Patman Act either is or is not an "antitrust law" within the meaning of Section 4 of the Clayton Act. The conflict likewise exists in District Court decisions, as shown by the citations contained in both opinions below, as well as in the opinion in the *Nashville Milk* vs. *Carnation Company* case, supra. The question is of such far-reaching importance in the field of civil antitrust litigation that the conflict should be promptly resolved by this Court.

2. The question presented involves the proper con-

struction of an Act of Congress having far-reaching importance in the field of commerce and antitrust litigation, which has not been but which should be determined and settled by this Court.

The question presented has not been decided by this Court, although the statute in question was passed in 1936. The remark relative thereto in the *Bruce's Juices* case, supra, was unnecessary to a decision in that case. Nor is that remark necessarily inconsistent with the contention here urged, since a single act of discrimination could be subject to both the civil penalty of treble damages under Section 2 of the Clayton act as amended by Section 1 of the Robinson-Patman Act, and to the criminal penalties under Section 3 of the Robinson-Patman Act.

The case of *Moore* vs. *Mead's Fine Bread Co.*, supra, is not dispositive of the issue here presented. In that case the question was neither raised, briefed nor argued in any court. The decision in that case should not be construed as controlling legal authority on a question not at bar and not adjudicated.

The thinking of legal writers and scholars is unanimous in support of petitioner's contention, and the extent thereof is indicative of the importance of the question presented.

Harvard Law Review, Volume 50, 106, 121, 122;

Wernc, "Business and the Robinson-Patman Law" (1938);

85 University of Pennsylvania Law Review, 306, 312;

22 Washington University Law Quarterly, 153, 182;

22 American Bar Association Journal, 539, P. 649, n.14;

The importance of the question and the necessity for

decision are further emphasized by the comment of the Attorney General's National Committee to Study the Antitrust Laws, which said, at Page 200 of its Report of March 3, 1955:

> "We believe that acceptance of Section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support neither in the legislative intent nor overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all, should be accessible only to the Government which has already sought to limit its application.

Numerous treble damage actions alleging violations of Section 3 of the Robinson-Patman Act have been brought, and are now pending in the District Courts. That such actions will be filed in the future in increasing numbers can be anticipated, especially when one considers the temptation to sue a competitor and the ease of charging sales at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor". The course of all such litigation will be controlled by a decision of the question here presented. The issue presented is appropriate for review by this Court because it is fundamental to the further conduct of this case. *Land* vs. *Dollar*, 330 U.S. 731, 734, n.2, 91 L. ed. 1209, 1214 (1947); *U.S.* vs. *General Motors*, 323 U. S. 373, 377, 89 L. ed. 311, 318; (1945) *Larson* vs. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3, 93 L. ed. 1628, 1633 (1948)

3. The decision of the Court below is believed to be erroneous, and the conflicting decision of the Seventh Circuit is correct and should be sustained.

The Court below does not dispute the general rule that where a statute creates a new offense and denounces the penalty, the penalty can be only that which the statute prescribes.

Wilder Manufacturing Co. vs. *Corn Products Refinery Co.*, 236 U.S. 165, 59 L. ed. 520; (1914)

United States vs. *Cooper Corp.*, 312 U. S. 592, 85 L. ed. 1071, 1076 (1940)

Paine Lumber Co. vs. *Neal*, 244 U.S. 459, 61 L. ed. 1256 (1916)

Bruce's Juices, Inc. vs. *American Can Co.*, supra.

The Court below likewise agrees that the United States Code is only prima facie evidence of the law, and the statute must control in the event of discrepancy. It further agrees that if Section 3 of the Robinson-Patman Act is not an amendment to the Clayton Act so as to be a part thereof, no treble damage remedy exists.

Its decision is based solely upon its assumption that Section 3 of the Robinson-Patman Act relates generally to the antitrust field and, for such reason is necessarily a part of the Clayton Act, which we submit is erroneous. The assumption could be applied with equal justification to Section 5 of the Federal Trade Commission Act, (15 USC Section 45, 38 Stat. 719). This Court has held that no private right of action exists under said statute. *Moore* vs. *New York Cotton Exchange*, 270 U.S. 593, 603 70 L. ed. 751 (1926). The assumption further disregards the text, punctuation and structure of the Robinson-Patman Act as well as its legislative history, both of which are analyzed in the opinion of the District Court in this case and in the opinion in the *Nashville Milk* vs. *Carnation Company* case, supra. Both demonstrate that Congress did not intend Section 3 of the Robinson-Patman Act to be a part of or

an amendment to the Clayton Act. This assumption is in conflict with the unanimous opinion of legal writers.

CONCLUSION

It is respectfully submitted that the petition should be granted, and the Writ issue.

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APPENDIX A

United States Court of Appeals

Tenth Circuit

No. 5366 SEPTEMBER TERM, 1956.

HARRY V. VANCE, Trustee in Bankruptcy for FRANK MELVIN THOMPSON, Bankrupt, *Appellant*,

vs.

SAFEWAY STORES, INCORPORATED, a corporation, *Appellee*.

Appeal from the United States District Court for the District of New Mexico.

Robert J. Nordhaus, Albuquerque, New Mexico, (Nordhaus & Moses), for Appellant;

John B. Tittmann, Albuquerque, New Mexico, (W. A. Keleher, Albuquerque, New Mexico; Douglas Stripp, and Watson, Ess, Marshall & Enggas, all of Kansas City, Missouri, were with him on the brief), for Appellee.

Before HUXMAN, MURRAH and PICKETT, *Circuit Judges*.

PICKETT, *Circuit Judge*.

The Trustee in Bankruptcy for Frank Melvin Thompson brought this action against Safeway Stores, Inc., to recover treble damages under §3 of the Robinson-Patman

Act, (15 U.S.C.A. §13a[1]). The complaint is based solely upon violations of the second and third clauses of §3, wherein it is alleged that Safeway made sales at unreasonably low prices and territorial discrimination in prices for the purpose of injuring competition to the damage of Thompson, who at the time was in the retail grocery business in Albuquerque, New Mexico. It suffices to say that the allegations, if true, constituted violations of §3. The trial court expressed doubt as to the constitutionality of §3, but chose to base its conclusion on a holding that the section was no part of the antitrust statutes of the United States, and dismissed the action on the ground that a civil action for treble damages was not available to a private litigant under 15 U.S.C.A. §15. We do not agree with this conclusion.

15 U.S.C.A. §15 was included in the Clayton Act, (38 Stat. 730), and provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, * * *" together with reasonable attorney's fees and costs. The Clayton Act defined "antitrust laws" as designated statutes existing at the time. Upon codification this section became 15 U.S.C.A. §12, and defined "antitrust laws" as sections 1-27 of Title 15. It is contended that §13a was not

[1] §13a reads as follows:

"Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both. June 19, 1936, c. 592, §3, 49 Stat. 1528."

one of those antitrust laws as defined in §1 of the Clayton Act and the codifiers could not amend the law by including it in §12. This is no doubt true if §3 is a separate act. The code is only prima facie evidence of the law, and the language of the original statute controls. Act creating U.S. Code, U.S.C.A. Vol. 1, p. 4; Stephan v. United States, 319 U.S. 423; Murrell v. Western Union Tel. Co., 5 Cir. 160 F.2d 787. If, however, §3 is in fact an amendment to the Clayton Act, it was properly designated in the codification. To be an amendment to an existing law, the statute need not be so labeled. A law is amended when it is permitted to remain and something is added or taken from it or is in some way changed or altered to better accomplish its purpose. United States v. Lapp, 6 Cir., 244 Fed. 277; Balian Ice Cream Co. v. Arden Farms Co., 94 F.Supp. 796.

In holding that §3 was not an amendment to the Clayton Act but a separate Act for which a civil remedy was not available to the plaintiff under §15, the trial court relied to a large extent upon the legislative history of the Act. Safeway here insists that the history sustains the trial court, while the Trustee maintains the opposite view. We think a study of the committee reports, the discussions and debates on the Robinson-Patman Act, both in the House and Senate, leads to the conclusion that it was generally understood at the time that §3 of that Act was supplementary and amendatory of the antitrust laws and that in addition to the criminal sanctions, an injured party could recover treble damages under the provisions of the Clayton Act. The Act dealt exclusively with the subject matter of the existing antitrust laws. It was a continuation of the Congressional attack upon the evils of combinations, monopolies and restraints of trade and commerce designed to stifle competition. In each instance "Congress was dealing with competition which it sought to protect, and monopolies which it sought to prevent." Standard Oil Co. v. United States, 340 U.S. 231, 249; Staley Mfg. Co. v. Federal Trade Commission, 7 Cir., 135 F.2d 453. The title to the Act states that it is an act to amend §2 of the Clayton Act, and for other purposes, but the enacting

clause recites only that §2 "is amended to read as follows:" and the entire Robinson-Patman Act follows, although the first section, designated as §2, is in quotation marks, while the last three sections are not. We do not think that failure to include the last three sections in quotation marks has the significance which the trial court gave to it, because these sections are not referred to in any other manner than in the enacting clause. Without specific language excluding these three sections from the enacting clause, we feel constrained to hold that they are included thereunder and must be considered as amending the Clayton Act.

In Balian Ice Cream Co. v. Arden Farms Co., supra, Judge Yankwich, in a thorough and painstaking review of antitrust legislation and the authorities, concluded that §3 was an amendment of the Clayton Act and upheld the right of a private litigant to sue for treble damages under §15. We adopt the reasoning and conclusions reached in that case. Generally the courts which have had occasion to consider the question have agreed that the recovery of treble damages was available to private litigants for violation of §13a. Atlanta Brick Co. v. O'Neal, (D.C.E.D. Tex.) 44 F.Supp. 39; A.J. Goodman & Son v. United Lacquer Mfg. Corp., (D.C. Mass.) 81 F.Supp. 890; Spencer v. Sun Oil Co. (D.C.Conn.) 94 F.Supp. 408; Myers v. Shell Oil Co. (D.C.S.D.Calif., Cen. Div.) 96 F.Supp. 670; Hershel Calif. Fruit Prod. Co. v. Hunt Foods, (D.C.N.D.Calif. S.D.) 119 F.Supp. 603, appeal dismissed 9 Cir., 221 F.2d 797. National Used Car Market, Inc., v. Nat'l Auto Dealers Assn. (D.C., D.C.) 108 F.Supp. 692, the District Court was inclined to the view that §3 did not provide a civil remedy for damages, but did not so hold. The action was dismissed on other grounds and affirmed, 200 F.2d 359.

Although it was not necessary to a decision in the case, the Supreme Court in Bruce's Juices, Inc., v. American Can Co., 330 U.S. 743, 750, had this to say:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction

a violator may be fined or imprisoned. 49 Stat. 1528, 15 U.S.C. §13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. 38 Stat. 731, 15 U.S.C. §15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."

Considering the result in Moore v. Mead's Fine Bread Co., 10 Cir., 184 F.2d 338, vacated and remanded 340 U.S. 945; and 208 F.2d 777, reversed 348 U.S. 115,[1] and what was said in the Bruce's Juices case, without further word from the Supreme Court, we would be extremely hesitant to hold that a valid judgment for treble damages could not be had for violations of §13a.

Reversed.

[1] In the Mead Bread case, as in this case, the plaintiff sought treble damages for violations of §13a. We first sustained a dismissal of the complaint. Upon mandate from the Supreme Court, this judgment was vacated and the case was tried to a jury which returned a verdict in favor of Moore for treble damages. We reversed and remanded with instructions to enter judgment for the defendant. The Supreme Court reversed and affirmed the judgment of the District Court. Although the question here was not raised, the court held that violations of §13a were "included within the scope of the antitrust laws" with the right to treble damages, even though the victim is a local resident and no interstate transactions were used to destroy it.

In the
United States Court of Appeals
For the Seventh Circuit

No. 11820 SEPTEMBER TERM AND SESSION, 1956.

NASHVILLE MILK COMPANY,
Plaintiff-Appellant,
v.
CARNATION COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

November 1, 1956.

Before DUFFY, *Chief Judge*, and MAJOR and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Chief Judge*. This is an appeal from an order dismissing the complaint herein before trial. This action was brought under §3 of the Robinson-Patman Act (§ 13a, Title 15 U.S. Code). Plaintiff sought to recover treble damages and asked injunctive relief claiming defendant had sold filled milk at unreasonably low prices for the purpose of destroying competition by plaintiff in its sale of a like product.

Plaintiff is an Illinois corporation, and since April, 1951, has manufactured and sold filled milk within the State of Illinois where such manufacture and sale is legal under the laws of Illinois. Defendant is a Delaware corporation which owns and operates some 30 factories in 20 states for the processing of milk.

Since May, 1952, defendant has manufactured filled milk

at its factory located at Morrison, Illinois. For the purpose of manufacturing filled milk defendant has transported or caused to be transported into Illinois whole milk from the State of Wisconsin, and vegetable oils from various points outside of Illinois. The filled milk manufactured by Carnation has been marketed under the name "Topic" while plaintiff's filled milk product was marketed under the name "Rich Whip".

Defendant moved to dismiss the complaint on four grounds. 1) The Robinson-Patman Act does not protect a business engaged in making and selling a product banned by Congress from the channels of interstate commerce; 2) The complaint fails to allege that any sales of filled milk by either plaintiff or defendant were in the course of interstate commerce; 3) The complaint fails to allege that the manufacture of filled milk by the defendant was in the course of interstate commerce, and 4) A private action may not be maintained for an alleged violation of § 3 of the Robinson-Patman Act.

The District Court dismissed the complaint for the reason that no relief should be accorded to the plaintiff in view of the declared congressional policy relative to filled milk as announced in 21 U.S.C.A. § 62 which proscribes the shipment or delivery for shipment of filled milk in interstate commerce.

The decision of the District Court must be affirmed if the order of dismissal can be sustained on any of the grounds urged by defendant in support of its motion to dismiss. *Gallagher & Speck, Inc.* v. *Ford Motor Company*, 7 Cir., 226 F. 2d 728, 731. Inasmuch as we are convinced that a private action may not be maintained for a violation of § 3 of the Robinson-Patman Act, we shall not discuss the other grounds urged by the defendant.

The Supreme Court has not ruled upon this question[1]

[1]Section 3 has been referred to in Supreme Court dicta as though it were a statute under which a private suit for treble damages could be maintained. Bruce's Juices, Inc. v. American Can Co., 330 U. S. 743, 750, and Moore v. Mead's Fine Bread Co., 348 U. S. 115, 117. However, in neither of these cases was the private right to sue under Section 3 in issue.

and as far as we are advised, there has been no direct decision on the point by any Court of Appeals. There is, however, a direct conflict of authority in the District Courts. The leading case which holds that such a cause of action does exist is *Balien Ice Cream Co. Inc.* v. *Arden Farms Co., et al.*, 94 F. Supp. 796 (DC Calif. 1950). The leading case to the contrary is *Vance* v. *Safeway Stores*, 137 F. Supp. 841 (DC N. Mex., 1956). In the *Vance* case Judge Rogers carefully considered the decision in the *Balien Ice Cream* case and reached the conclusion that it was wrongly decided.

Plaintiff has no right to sue for treble damages or injunctive relief unless a federal statute has created that right. *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 7 Cir., 213 F. 2d 284, 286; *Paine Lumber Company, Ltd. et al.* v. *Neal etc. et al.*, 244 U.S. 459, 471. The only statutes upon which the plaintiff could possibly rely are sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26); Section 4 provides that any person injured in his business or property by reason of anything forbidden by the "antitrust laws" may recover treble damages. Section 16 authorizes private suits for injunctive relief against threatened damage by a violation of the "antitrust laws."

The Clayton Act (38 Stats. 730) defines the term "antitrust laws" and states precisely what that term means as it is used throughout the Act. Section 1 of the Clayton Act defines "antitrust laws" to mean the Sherman Act (Act of July 2, 1890), the Wilson Tariff Act (Act of August 27, 1894), the Act amending the Wilson Tariff Act (Act of February 12, 1913) and the Clayton Act itself.

It is quite apparent that confusion has arisen as to whether section 3 of the Robinson-Patman Act is an "antitrust law" within section 1 of the Clayton Act because of an error in codification in the 1940 U.S. Code. In the 1926 U.S. Code, section 1 of the Clayton Act was codified (15 U.S.C. § 12) to read: "'Antitrust laws' as used in sections 12-27 of this title (Title 15) includes sections 1-27 of this title." This was correct because sections 1-27

of Title 15 were the Sherman Act, the Wilson Tariff Act (as amended) and the Clayton Act. The 1934 Code was the same.

However, in the 1940 Code which followed the passage of the Robinson-Patman Act in 1936, the codifiers only partially recognized that sections 2, 3 and 4 of the Robinson-Patman Act (codified as 15 U.S.C. § 21a, § 13a and § 13b) were no part of the Clayton Act or any amendments to any of its sections by changing the figures "12-27" in 15 U.S.C. 12 (the codification of section 1 of the Clayton Act) to 12, 13, 14-21, 22-27," so that the statute read: "'Antitrust laws' as used in Secs. 12, 13, 14-21 and 22-27 of this title includes secs. 1-27 of this title." But the codifiers failed to make a corresponding change in the figures 1-27 with the result upon casual inspection the term "antitrust laws" might seem to include secs. 2, 3 and 4 of the Robinson-Patman Act. The 1946 and 1952 Codes continued the error.

However, the United States Code is only prima facie evidence of the laws of the United States. In case of inconsistencies between the code and the corresponding legislation theretofore enacted, effect is to be given to the enactments themselves. 1 U.S.C. p. 4; *Stephan* v. *United States*, 319 U.S. 423, 426.

Because section 1 of the Robinson-Patman Act is without question an amendment of the Clayton Act, it has been argued that section 3 is also such an amendment. A close examination of the text of the Robinson-Patman Act and of its legislative history convinces us that section 3 is not an amendment of the Clayton Act.

The first section of the Robinson-Patman Act begins with this statement: "Be it enacted * * * that Sec. 2 of (the Clayton Act) is amended to read as follows:". No such statement appears at the beginning of sections 2, 3 or 4 of the Robinson-Patman Act. These sections do not purport to amend as section 1 specifically did.

Immediately following the enacting clause, section 1 con-

tinues with the text of subsections (a) through (f) each subject being enclosed in quotation marks so as to show how the amended section 2 of the Clayton Act is to read. There are no quotation marks enclosing any of the remaining sections. This ommission of quotation marks is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress of the United States. Illustrations of the practice of enclosing in quotation marks that portion of the bill which amended other laws can be seen in such legislation as Chapter 634, 49 Stat. 1555 relating to the Migratory Bird Act; Chapter 811, 49 Stat. 1925, relating to Naturalization Laws and Chapter 816, 49 Stat. 1930, relating to Welfare of American Seamen, in each of which quotation marks enclose the portions of those bills which amended existing law while quotation marks were omitted for those portions of the bills which were not amendments.

The legislative history is convincing that there was no intention by Congress for section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act. Senator Robinson and Representative Patman had introduced their bills in the Senate and House, respectively. About eight months later a bill known as the Borah-Van Nuys Bill was introduced into the Senate. This provided for a criminal statute. Later, the Borah-Van Nuys Bill was attached to the Robinson Bill in the senate by a floor amendment. The phraseology of the Borah-Van Nuys measure remained unchanged until its enactment as section 3 of the Robinson-Patman Act.

After the passage of the Patman bill in the House and the Robinson bill in the Senate, these bills went to a conference. The Conference Committee reported a revised draft on June 15, 1936 which incorporated the Borah-Van Nuys measure as section 3 (80 Cong. Rec. 9414). The report of the Conference Committee (80 Cong. Rec. 9414, 9902) expressly stated that only section 1 was an amendment of the Clayton Act. The report stated:

"Section 2.

"The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as section 2 of the bill itself, rather than as part of *the amendment to section 2 of the Clayton Act, which is provided for in section 1 of the present Bill.*" (Emphasis supplied)

"Section 3.

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and * * * appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S. 4171). *While they overlap in some respects*, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in section 1.*" (Emphasis supplied)

Representative Utterback, Chairman of the House Members of the Joint Conference Committee, stated in his report to the House (80 Cong. Rec. 9419): "Section 3 of the bill sets aside certain practices therein described, and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the scope or operation of the prohibitions or limitations laid down by *the Clayton Act amendment provided for in section 1.*" (Emphasis supplied).

Representative Miller, one of the House conferees of the Joint Conference Committee, stated (80 Cong. Rec. 9421): "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here *amends section 2 of the Clayton Act.*" Mr. Miller, when asked whether section 3 was "a part of the same act" as

the part of the bill amending the Clayton Act replied (80 Cong. Rec. 9421): "Of course it is, *but it is not a part of the Clayton Act* * * *." (Emphasis supplied).

Writers of law articles on the subject here for decision have taken the position that no action may be maintained for treble damages under section 3 of the Robinson-Patman Act. 50 *Harvard Law Review*, 106, 121-122; 85 *University of Pennsylvania Law Review*, 306, 312; 22 *Washington Law Quarterly*, 153, 159, 182; 22 *American Bar Association Journal*, 593, 649.

The Attorney General's National Committee to Study the Antitrust Laws said, on page 201 of its report of March 31, 1955:

> "We believe that acceptance of section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support neither in the legislative intent nor overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all, should be accessible only to the government which has already sought to limit its application."

As we have reached the conclusion that a private action may not be maintained for a violation of Section 3 of the Robinson Patman Act, it follows that the District Court was correct in dismissing the complaint and the order and judgment of dismissal must be and is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

Petitioner's Brief

Supreme Court of the United States

October Term, 1957

No. 69

SAFEWAY STORES, INCORPORATED,
a corporation
Petitioner,

vs.

HARRY V. VANCE, Trustee in
Bankruptcy for
FRANK MELVIN THOMPSON, BANKRUPT,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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CASES CITED:

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PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the United States District Court, for the District of New Mexico, is reported in 137 F. Supp. 841. It likewise appears in the Record herein, beginning at page 8. The opinion of the Court of Appeals for the Tenth Circuit is reported in 239 F.2d 144 and also appears in the Record herein, beginning at page 30. No opinion was rendered by the Court of Appeals in denying Petition for Rehearing.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit, sought to be reviewed, was dated November 6, 1956, and entered on the same date (R. 34).

The Petition for Rehearing was filed on November 26, 1956, (R. 34) and denied by Order entered December 4 (R. 42). On December 12, 1956, an Order was issued staying issuance of the mandate for thirty days from December 14, 1956, pending Petition for Certiorari (R. 42). Petition for Certiorari was filed January 22, 1957, and Certiorari was granted by Order filed in this cause March 4, 1957 (R. 42).

Jurisdiction of this Court is invoked under 28 USC, Sec. 1254 (1).

QUESTION PRESENTED

Does section 3 of the Robinson-Patman Act amend the Clayton Act so as to be one of the "antitrust laws" defined in section 1 of the Clayton Act, for violation of which section 4 of the Clayton Act creates a civil treble damage remedy?

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved, and the pertinent parts thereof are quoted herein as follows:

Robinson-Patman Act, Section 3,
49 Stat. 1528, Title 15 USC 13a:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competi

tors of the purchaser, in that any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

Clayton Act, Section 4,
38 Stat. 731, Title 15 USC 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act, Section 1,
38 Stat. 730 (1st paragraph)

"That 'antitrust laws' as used herein includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', of August twenty-seventh, eighteen hundred and ninety-four; an Act,

entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved February twelfth, nineteen hundred and thirteen; and also this act.''

Title 15 USC 12 (1st paragraph)

''As used in sections 12, 13, 14-21, and 22-27 of this title, 'antitrust laws' includes sections 1-27 of this title.''

STATEMENT OF THE CASE

The judgment of the Court of Appeals sought to be reviewed reversed the judgment of the District Court dismissing the First Amended Complaint (R. 34).

The First Amended Complaint charges petitioner with violations of Section 3 of the Robinson-Patman Act, 15 USC 13a, by selling goods in one part of the United States at prices lower than those exacted elsewhere in the United States, and by selling goods at unreasonably low prices, all for the purpose of destroying competition or eliminating competitors (R. 1-5).

Petitioner filed its Motion to Dismiss on the ground among others, that section 3 of the Robinson-Patman Act, 15 USC 13a, is not one of the "antitrust laws" within the purview of Section 4 of the Clayton Act, 15 USC 15, and consequently no private right of action for treble damages for violation thereof exists under the laws of the United States (R. 6). The District Court sustained the Motion to Dismiss on the ground above stated, reserving its ruling on other grounds included in the Motion, and entered its Order dismissing the case on January 18, 1956 (R. 7). Said order

granted respondent thirty days in which to amend, and respondent thereafter filed its election not to amend (R. 27). The District Court thereupon entered a supplemental order dismissing the First Amended Complaint, and the case (R. 27). An appeal was taken from this judgment (R. 28).

The Court of Appeals reversed the judgment of the District Court, and remanded the case for further proceedings (R. 34). The Court of Appeals held that section 3 of the Robinson-Patman Act 15 USC 13a, was an amendment of the Clayton Act and therefore an "antitrust law" within the meaning of section 4 of the Clayton Act, 15 USC 15, for violation of which a private litigant had a civil remedy for treble damages for any injury to his property caused by such violation, pursuant to 15 USC 15.

Federal jurisdiction in the court of first instance was based on Title 28 USC 1337.

SUMMARY OF ARGUMENT

A.

The complaint forming the basis of this action charges only that petitioner violated certain portions of section 3 of the Robinson-Patman Act (49 Stat. 1528; 15 U.S.C. 13a). That section is a criminal statute which does not provide a private treble damage remedy.

Where Congress creates an offense and provides a penalty, that penalty is exclusive. *Wilder Mfg. Co. v. Corn Products Co.*, 236 U.S. 165, 174-5 (1914). Section 4 of the Clayton Act (38 Stat. 731; 15 U.S.C. 15) which authorizes private treble damage suits for violations of the "antitrust laws" does not authorize an action for violation of section

3 of the Robinson-Patman Act because that section is not an "antitrust law" as such term is defined in section 1 of the Clayton Act (38 Stat. 730; 15 U.S.C. § 12).

Section 1 of the Clayton Act defines the term "antitrust laws" to include only three named statutes, the Sherman Act (15 U.S.C. § 1, *et seq.*), the Wilson Tariff Act (as amended), and the Clayton Act. Section 3 of the Robinson-Patman Act clearly is not a part of the Sherman Act or Wilson Tariff Act. Only if it amends the Clayton Act would section 3 be an "antitrust law" for the violation of which a private action is maintainable. Despite a codification error section 3 is clearly not a part of the Clayton Act.

B.

The text, punctuation and structure of the Robinson-Patman Act show that section 3 was not intended as an amendment to the Clayton Act. When Congress enacted the Robinson-Patman Act, it enclosed only the first section of that act in quotation marks as amendatory of section 2 of the Clayton Act (15 U.S.C. § 13). Sections 2, 3, and 4 of the Robinson-Patman Act are outside of quotation marks and these sections effect the "other purposes" of the Robinson-Patman Act as expressed in the title of said Act, apart from amending the Clayton Act. It is familiar drafting practice for Congress to include in quotation marks the portions of acts which amend existing law while omitting quotation marks from those portions not amendatory. The Congressional purpose was clearly not to make section 3 of the Robinson-Patman Act an amendment to the Clayton Act. Consequently, section 3 is not an "antitrust law" as defined in section 1 of the Clayton Act.

C.

The legislative history of the Robinson-Patman Act also demonstrates that section 3 is not an amendment to or part of the Clayton Act. The report of the Conference Committee and statements of members of that Committee emphasized that only the first section of the Robinson-Patman Act amended the Clayton Act and that section 3 did not purport to amend the Clayton Act. Rather it was recognized as a separate criminal statute containing its own standards of conduct and providing its own exclusive penalty.

The question of treble damages for violations of the Robinson-Patman Act was raised in both houses during consideration of the Conference bill, but only in the sense that if the same act violated both section 3 of the bill and section 1 of the bill (the latter of which amended section 2 of the Clayton Act) the violator would be subject both to treble damages for the Clayton Act violation and also to criminal prosecution for the violation of section 3. Nowhere was it expressly stated that a violation of section 3 gave rise to a private treble damage remedy.

D.

The sounder reasoning and the more persuasive authority support the decision of the district court herein (R. 8-27) and the decision of the Court of Appeals for the Seventh Circuit in *Nashville Milk Co.* v. *Carnation Co.* 238 F.2d 86 (7th Cir. 1956), (R. 35-41). The decision of the court below (R. 30-34) relies upon authorities that cannot withstand analysis and overlooks the plain language, text and punctuation of the Robinson-Patman Act and its legislative history.

The Congressional purpose as clearly expressed in sections 1 and 4 of the Clayton Act and section 3 of the Robinson-Patman Act is that no private cause of action is created by the latter statute. Section 3's proscriptions are extremely vague and to a certain extent overlap the provisions of other statutes. In the absence of clear Congressional authorization for private suits under that statute the public policy is best served by limiting the enforcement of the statute to governmental authorities. A court is not at liberty to do what Congress clearly did not do.

Accordingly, on principle and on authority the enforcement of section 3 must be entrusted solely and exclusively to the government.

ARGUMENT

A Private Litigant Cannot Recover Treble Damages for Violation of Section 3 of the Robinson-Patman Act

A. Section 3 is a Criminal Statute, with No Provision for a Private Treble Damage Remedy

The complaint forming the basis of this action solely alleges violations of section 3 of the Robinson-Patman Act (49 Stat. 1528; 15 U.S.C.A. 13a). That section is a criminal statute providing a penalty of a $5,000 maximum fine or imprisonment for one year or both. No civil sanctions are contained in it.

A private litigant has no right of action under the anti-trust laws unless that right is specifically granted by Congress. This Court has frequently applied the rule that

where Congress creates an offense and provides a penalty that penalty is exclusive.

This principle is illustrated by the case of *Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165 (1914). There the defendant sought to defend an action for the price of goods sold by pleading the illegality of the plaintiff corporation, alleging that it was organized in violation of the Sherman Act (15 U.S.C. 1, *et seq.*). This Court held that no such remedy was provided by that Act, stating (pp. 174-5):

> "It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.'"

When the Government sought to maintain an action for treble damages for violation of the Sherman Act, this Court held that the Government was not a "person" within section 7 of that Act and could not maintain the action. *United States v. Cliquot Corp.*, 312 U.S. 60 (1941). The remedy of injunction provided for by section 4 of the Sherman Act (38 Stat. 731; 15 U.S.C. 4) is limited to suits brought by the Government and a state or private litigant is not entitled to maintain an action under that section. *State of Minnesota v. Northern Securities Co.*, 194 U.S. 48, 70-71 (1904); *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917).

As recently as the case of *Bruce's Juices, Inc. v. Amer-*

can Can Co., 330 U.S. 743 (1946), this Court reaffirmed this doctrine and quoted with approval from the *Wilder Mfg. Co.* case, 236 U.S. 165, 174-5, the statement that where a statute creates a new offense and denounces the penalty, the penalty can only be that which the statute prescribes. In the *Bruce's Juices* case this Court refused to add a sanction not provided by Congress, refusing to declare the purchase price of goods uncollectible because sold at illegally discriminatory prices.

The right to recover treble damages, attorneys' fees and costs is a highly penal remedy, not a creature of implication. Standing alone section 3 creates no such action. It is a simple criminal statute establishing its own standards of conduct and its own penalties without reference to any other statute. Its antecedent is contained in the Canadian Criminal Code.[1]

The statute upon which respondent relies in asserting that private relief is available under section 3 of the Robinson-Patman Act is section 4 of the Clayton Act (38 Stat. 731; 15 U.S.C. §15). Section 4 provides that any person injured in his business or property by reason of anything

[1]Section 3 is based on Section 498A of the Canadian Criminal Code which provides:

"(1) Every person engaged in trade or commerce or industry is guilty of an indictable offense and liable to penalty not exceeding one thousand dollars or to one month's imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who (a) is a party or privy to, or assists in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

"The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

"(b) engaged in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

"(c) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor" (25-26 Geo. V., Ch. 56, Sec. 9).

forbidden in the "antitrust laws" may recover treble damages.

The term "antitrust laws" for violations of which section 4 of the Clayton Act affords private relief is not just a general phrase. The Clayton Act contains its own dictionary in its first section (38 Stat. 730; 15 U.S.C. 12), defining the term "antitrust laws" and stating precisely what this term means as used throughout the Act.

Section 1 of the Clayton Act provides in part as follows:

> "That 'antitrust laws' as used herein includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved February twelfth, nineteen hundred and thirteen; and also this Act."

In short, Section 1 of the Clayton Act defines "antitrust laws", as such term is used through the Clayton Act, to mean:

1. The Sherman Act (Act of July 2, 1890),

2. Portions of the Wilson Tariff Act (Act of August 27, 1894),

3. The Act amending the Wilson Tariff Act (Act of February 12, 1913), and

4. The Clayton Act ("this Act").

The specific mention of these acts as "antitrust laws" necessarily excludes all other acts such as the Federal Trade Commission Act (15 U.S.C. §45) and all portions of the Robinson-Patman Act not amendatory of the Clayton Act. If Congress meant to include other acts as "antitrust laws" it would have been simple enough either to have specifically mentioned them or else to have refrained from the specific enumeration of any act. The expression of one thing in a statute is the implied exclusion of all other things—*inclusio unius est exclusio alterius*.[1]

Mr. Justice Brandeis stated the same idea in the following language in *Iselin* v. *United States*, 270 U.S. 245, 250, 251 (1926):

> "The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax were specified, preclude an extension of any provision by implication to any other subject. * * * What the Government asks is not a 'construction of a statute,' but, in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope."

So asks respondent here. But the exact and detailed definition of certain specific acts and only certain sections

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[1] Webster's New International Dictionary, 2nd Ed. 1934, defines the word "include" as follows:

"1. To confine; shut up; enclose; as, the nutshell *includes* the kernel."

"2. To comprehend or comprise, as a genus the species, the whole a part, an argument or reason the inference; to take or reckon in; to contain; embrace; as, this volume *includes* the essays; ten and *including* the tenth."

[2] Where, as here, the use of this maxim is consistent with the context of the statute and its legislative history, it is recognized as valuable aid to construction. *United States* v. *Sweeney*, 157 U.S. 281, 286 (1895); *United States* v. *Kauscher*, 119 U.S. 407, 420 (1886). Cf. *Ford* v. *United States*, 273 U.S. 593, 611-612 (1927).

of other Acts in Section 1 of the Clayton Act, as the "anti-trust laws" referred to in that Act, preclude extension thereof to any other Act or part of an Act.

Also, as Mr. Justice Frankfurter has said, one must not only listen attentively to what a statute says, but must also listen attentively to what it does not say.[1] The definition in section 1 does not say (as it easily could have said) that "antitrust laws" as used therein also included "such other acts or parts of acts, now in force or enacted hereafter, as may regulate, control or forbid any conduct in restraint of trade or tending to promote monopoly."

As the District Court noted in its decision in the case at bar (R. 14-15):

> "In order to determine the meaning of the words 'Anti-trust laws', one must look at this section of Title 15 U.S. Code, defining the words used therein. * * *"

The same conclusion was reached by the Court of Appeals for the Seventh Circuit in *Nashville Milk Co. v. Carnation Co.*, 238 F.2d 86, 88 (1956), (R. 37):

> "The Clayton Act (38 Stats. 730) defines the term 'antitrust laws' and states precisely what the term means as it is used throughout the Act. * * *"

In fact, all courts that have considered this problem, including the court below (R. 31), have followed the definition of "antitrust laws" as contained in section 1 of the Clayton Act in determining the meaning of such phrase as used in section 4 thereof. See also *Atlanta Brick Co. v. O'Neal*, 44 F.Supp. 39, 42 (E.D. Tex. 1942); *Bahian Ice*

[1] Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. L. Rev. 527, 536 (1947).

Cream Co. v. Arden Farms Co., 94 F.Supp. 796, 797 (S.D. Cal. 1950).

Therefore, unless section 3 of the Robinson-Patman Act is an "antitrust law" as such term is defined in section 1 of the Clayton Act, respondent has no cause of action herein under section 4 of the Clayton Act.

The Clayton Act was passed October 15, 1914, 38 Stat. 730. The Robinson-Patman Act was not in existence at that time, it having been enacted more than twenty years later. Section 1 of the Clayton Act was never amended to include the Robinson-Patman Act, so that unless section 3 of such Act is a part of the Clayton Act it does not afford a right of action for treble damages to private litigants.

Some confusion has arisen as to whether section 3 of the Robinson-Patman Act is an "antitrust law" within section 1 of the Clayton Act because of a codification error.

In the 1926 U.S. Code, section 1 of the Clayton Act was codified in part as follows (15 U.S.C. §1):

> "'Antitrust laws', as used in sections 12-27 [the Clayton Act] of this title [title 15], includes sections 1-27 of this title."

This codification was correct at the time it was done because Sections 1-27 of Title 15 were the Sherman Act, the Wilson Tariff Act (as amended) and the Clayton Act. This is also true of the 1934 Code.

The error occurred in the 1940 U.S. Code. The Robinson-Patman Act was enacted in 1936 (49 Stat. 1526). In the 1940 Code the codifiers changed the codification of Section 1 of the Clayton Act (15 U.S.C. §12) so that the statute read:

> "'Antitrust laws,' as used in sections 12, 13, 14-21

and 22-27 of this title, includes sections 1-27 of this title."

Sections 2, 3 and 4 of the Robinson-Patman Act had been codified as 15 U.S.C., §21a, 13a and 13b, respectively. The codifiers partially recognized that these sections were not part of the Clayton Act by changing the figures "12-27" in the earlier codification of 15 U.S.C. §12 to read "12, 13, 14-21 and 22-27".

But the codifiers failed to make a corresponding change in the figures "1-27" appearing in the earlier codifications. The result is that the term "antitrust laws" as used in section 1 of the Clayton Act (15 U.S.C. §12) appears to include Sections 2, 3 and 4 of the Robinson-Patman Act whereas these sections did not amend the Clayton Act, the Sherman Act or the Wilson Tariff Act. The other three acts are "antitrust laws" as such term is used throughout the Clayton Act, including Section 4 thereof (15 U.S.C. §15). The 1946 and 1952 codifications continued this error.

In providing for the codifications of its laws, Congress did not give the codifiers power to change or amend existing law or to enact new law. Section 2(a) of the Act of 1925 (1 U.S.C., p. 4) which authorized the Code states:

> "The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments."

Thus the Code is only prima facie evidence of the law. When its language differs from the language of the statute as enacted the statute itself must control. *Stephan* v. *United States*, 319 U.S. 423 (1943); *Murrell* v. *Western Union Telegraph Co.*, 160 F.2d 787, 788-9 (5th Cir. 1947).

The inconsistency between section 1 of the Clayton Act as enacted and 15 U.S.C. §12, must, therefore, be resolved by giving full force and effect to section 1 and 15 U.S.C. §12 must be disregarded.

Section 3 of the Robinson-Patman Act is clearly not part of the Sherman Act or the Wilson Tariff Act, but because section 1 of the Robinson-Patman Act (15 U.S.C. §13) clearly and explicitly amends the Clayton Act it has been contended that section 3 of the Robinson-Patman Act also amends the Clayton Act. However, the text, punctuation, structure and legislative history of that act all point to the inevitable conclusion that it does not amend the Clayton Act.

B. The Text, Punctuation and Structure of the Robinson-Patman Act Show that Section 3 was not Intended as an amendment of the Clayton Act.

The construction of a statute begins with its text. As this Court said in *United States* v. *American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."

Duparquet Co. v. *Evans*, 297 U.S. 216 (1936), also demonstrates the importance of considering the text and structure of a statute in construing the same (p. 2 *supra*):

> "There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."

The Robinson-Patman Act has four sections, the first of which is not numbered. That first section amends the Clayton Act. It does so by the familiar method of including within quotation marks the new phrasing of the amended part of the statute, as follows:

> "Be it enacted * * * That Section 2 of [the Clayton Act] is amended to read as follows:
>
> "'SEC. 2. (a) * * * * *'"

The quotation marks cover from "Sec. 2(a)" through the text of Sec. 2(f). The quotation is closed just before the beginning of section 2 of the Robinson-Patman Act. Clearly the portions of the Robinson-Patman Act which fall outside the quotation marks do not amend the Clayton Act.

Section 2 of the Robinson-Patman Act explains the manner in which the amending provisions shall be applied to pending claims and litigation and is temporary legislation, not in itself amendatory of the permanent provisions of the Clayton Act. Section 4 of the Robinson-Patman Act is an exculpatory statute for cooperative associations.

Section 3 of the Robinson-Patman Act is likewise outside of the quotation marks. Moreover, it has the same section number as the original and still existing section 3 of the Clayton Act (38 Stat. 731; 15 U.S.C. 14), which prohibits exclusive dealing contracts under certain circum-

stances. Section 3 of the Robinson-Patman Act does not supplant nor amend section 3 of the Clayton Act and in fact it does not relate to the same subject matter. By contrast the first section of the Robinson-Patman Act uses the same section number (2) as the former Clayton Act provisions which it amends and supersedes and the new section 2 deals with the same subject matter as its predecessor.

Consideration of the title and the enacting clause of the Robinson-Patman Act also compels the conclusion that only the first portion of the Robinson-Patman Act amends the Clayton Act. The title of the Robinson-Patman Act reads:

> "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), *and for other purposes.*" (Emphasis added.)

This language clearly states that the intended amendment is limited to Section 2 of the Clayton Act. Two purposes are stated: (1) To amend the Clayton Act and (2) other purposes. Only the first section amended the Clayton Act. Sections 2, 3 and 4 effect the "other purposes." If sections 2, 3, and 4 were also amendments there would be no reason to mention "other purposes" and the reference to them would be meaningless.

The enacting clause reads:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved

October 15, 1914, as amended (U.S.C., title 15, sec. 13), is amended to read as follows:"

This language expressly limits the amendment of the Clayton Act to section 2 thereof.

The holding of the court below that the enacting clause is applicable to all sections of the Act because they are not expressly excluded from such clause (R. 32) is unwarranted. This involves circular reasoning and does violence to the plain language of the Act.[1] As the district court noted in the case at bar (R. 15-16):

> "Section 2, regarding pending litigation, Section 3 being the Act upon which plaintiff Vance seeks damages herein, and Section 4 being an exclusion of cooperative associations; do not purport to be amendatory of any then existing Anti-trust Act. Congress does not appear to even have attempted to so amend existing Anti-trust Acts, and such an intent should not be implied by those of us whose duty it is to construe Congressional Statutes."

As pointed out in the opinion of the Court of Appeals for the Seventh Circuit in *Nashville Milk Company v. Carnation Company*, 238 F.2d 86, 89 (1956) (R. 39), it is familiar drafting practice for Congress to enclose in quotation marks

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[1] The ruling of the court below on this question was criticized in Frank, "Trade Regulation—Section 3 of the Robinson-Patman Act Unavailable as Basis for Private Treble-Damage and Injunction Suits," 25 Geo. Wash. L. Rev. 461 (1957) as follows (p. 464):

"It is believed that broad generalizations of this nature (i.e., 'that Sec. 3 amends the Clayton Act because it adds something to existing law to better accomplish its purpose') dismiss too readily such important counter-factors as (1) the criminal nature of section 3 as opposed to the basically civil nature of the remedies afforded by the Clayton Act; (2) the absence of quotation marks around Section 3 as contrasted with the inclusion of section 1 in quotation marks and (3) the apparent belief on the part of the authors of the Robinson-Patman Act that section 3 was a strictly criminal enactment. It is submitted that the Seventh Circuit reached the correct conclusion in the instant case; and that section 3 of the Robinson-Patman Act should not be made available to private litigants."

the portions of acts which amend existing law while omitting quotation marks from those portions not amendatory."

The omission of quotation marks around section 3 of the Robinson-Patman Act is thus highly significant. Had Congress meant section 3 as an amendment of the Clayton Act it could easily have said so.

The plain language, punctuation and structure of the Robinson-Patman Act make it clear that section 3 of that Act is not part of the Clayton Act. It necessarily follows that section 3 is not part of "this Act" as that phrase is used in section 4 of the Clayton Act (15 U.S.C. §12). From this it must be concluded that section 3 of the Robinson-Patman Act is not one of the "antitrust laws" for violation of which private treble damage relief is provided by section 4 of the Clayton Act (15 U.S.C. §15).

C. The Legislative History Demonstrates that Section 3 is Not an Amendment to or Part of the Clayton Act and that Congress' New Section 3 Does Not Authorize Private Relief.

Both of the lower courts herein (R. 14, 23-27, 31-32) as

[1] In addition to the acts cited by the Seventh Circuit in the *Corn Products* case (R. 30), see also, for example, the following acts enacted by the 84th Congress, 2nd Session:

"Vessels Carrying Passengers—Inspection and Certification", 70 Stat. at Large, Chapt. 258, Public Law 581 [H.R. 7952]

"Highway Act of 1956", 70 Stat. at Large, Chapt. 462, Public Law 627 [H.R. 10660]

"Farm Credit Act of 1956", 70 Stat. at Large, Chapt. 781, Public Law 809 [H.R. 10285]

"Marine Corps, Bandmasters' Rank", 70 Stat. at Large, Chapt. 686, Public Law 773 [H.R. 8296]

"Alaska Mental Health Enabling Act", 70 Stat. at Large, Chapt. 772, Public Law 850 [H.R. 6370]

"Federal Executive Pay Act of 1956", 70 Stat. at Large, Chapt. 804, Public Law 854 [H.R. 7999]

"Department of Agriculture Organic Act of 1956", 70 Stat. at Large, Chapt. 950, Public Law 979 [H.R. 11682]

well as the Court of Appeals for the Seventh Circuit in *Nashville Milk Co. v. Carnation Co.* (R. 39-40) made extensive references to the legislative history of the Robinson-Patman Act.

The Patman bill (H.R. 8442) was introduced in the House by Representative Patman on June 11, 1935 (79 Cong. Rec. 9081). Joint hearings were held beginning July 10, 1935, and extending through the last session of the 74th Congress on the Patman bill and also on H.R. 4995 and H.R. 5062 introduced by Representative Mapes. Unable to reach a conclusion on the basis of its first hearings, further hearings were entrusted to a subcommittee headed by Representative Utterback. Prior to reconvening his subcommittee in February 1936, Mr. Utterback introduced his own bill (H.R. 10486), some features of which were ultimately incorporated into the Patman bill. On March 31, 1936, the House Committee favorably reported the Patman bill in modified form. It was passed by the House on May 28, 1936 (R. 23-4, 26).

On June 26, 1935, shortly after the introduction of the Patman bill in the House, Senator Robinson introduced an identical measure (S. 3154) in the Senate (79 Cong. Rec. 10329). No hearings were ever held on this measure. On February 3, 1936, the Senate Committee on the Judiciary favorably reported the Robinson bill with substantial amendments (R. 26).

On January 16, 1936, Senator Borah introduced a bill (S. 3670) dealing with price discrimination (80 Cong. Rec. 461) and on January 30, 1936, Senator Van Nuys introduced a similar measure (S. 3735) (80 Cong. Rec. 1194). On March 4 Senators Borah and Van Nuys consolidated their bills (S. 4171) (80 Cong. Rec. 3204) on which a subcommittee of

the Committee on Judiciary held hearings. No report was ever made on these measures (R. 26).

Section 3 of the Robinson-Patman Act as finally enacted originated as the Borah-Van Nuys bill (S. 4171). When the Robinson bill came to a vote in the Senate on April 23-24, 1936, the Borah-Van Nuys bill was attached to it as a floor amendment. As passed by the Senate it appeared as subsection (h) of the portion of the Robinson bill amending section 2 of the Clayton Act. The Borah-Van Nuys language was included in the quotation marks surrounding the entire amendment of section 2 of the Clayton Act appearing, as noted, as subsection (h) of said section (80 Cong. Rec. 814-19).

The Patman bill as passed by the House and the Robinson bill as passed by the Senate were referred to a Conference Committee. This Committee revised the bills and took the Borah-Van Nuys language out of the amendment of section 2 of the Clayton Act and out of quotation marks and carried it in the Committee bill as section 3 in which form it was finally passed (80 Cong. Rec. 9414). The action of the Conference Committee in removing the Borah-Van Nuys portion of the bill from the amendment of the Clayton Act affirmatively demonstrates that it was not intended as an amendment of such Act.

The language of the Borah-Van Nuys bill was unchanged from the time of its introduction until the time of its amendment. It is almost identical in wording to the Canadian Price Discrimination Act (see note), (p. 10, supra).

The report of the Conference Committee (80 Cong.

[illegible] Court has uniformly recognized committee reports, and statements of committee members as the most persuasive source of legislative history. [illegible] *Hearst v. Union Branch Bank*, 300 U. S. 440, 453-54 (1937); *United States v. United Mine Workers*, 330 U.S. 258, 278-80 (1947); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474-75 (1921); *Chicago, [illegible] Ry. Co. v. Minn. Rate Freight Co.*, 336 U. S. 465, 472-7 (1940).

Rec. 9414, 9902) with respect to both sections 2 and 3 of the Conference bill (subsequently enacted as the Robinson-Patman Act) expressly stated that only section 1 thereof was an amendment of the Clayton Act saying:

"Section 2.

"The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as section 2 of the bill itself, rather than as part of *the amendment to Section 2 of the Clayton Act, which is provided for in Section 1 of the present Bill.*

"Section 3.

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and, except for the paragraph dealing with cooperatives, separately treated in section 4 below, appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S. 4171). *While they overlap in some respects*, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in Section 1.*

"Section 3 authorizes nothing which *that amendment* prohibits and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of *the amendment provided in section 1*, section 3 sets up special prohibitions as to the particular offense therein described and attaches to them also the criminal penalties *therein* provided.

"Section 3 makes it possible for the person subjected to a discrimination prohibited *therein* to cause the offender to be prosecuted in the Federal Court of the district in which such violation is committed."

(House Report No. 2951, 74 Cong., June 8, 1936.) (Emphasis added.)

Representative Utterback, Chairman of the House Members of the Joint Conference Committee, in his report to the House with respect to section 3 (the Borah-Van Nuys bill) said (80 Cong. Rec. 9419):

> "Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the scope or operation of the prohibitions or limitations laid down by *the Clayton Act amendment provided for in Section 2*. It authorizes nothing therein prohibited. It detracts nothing from them. Most of the acts which it does prohibit lie also within the prohibitions of that amendment. In that sphere this section merely attached to them its criminal penalties in addition to the civil liabilities and remedies already provided by the Clayton Act." (Emphasis added.)

Representative John E. Miller of Arkansas, now Federal District Judge for the Western District of Arkansas, one of the House Conferees of the Joint Conference Committee, stated (80 Cong. Rec. 9421):

> "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. *The first section of the bill as reported, has to do with only section 2 of the Clayton Act.*" (Emphasis added.)

Representative Miller, when asked whether section 3 was "a part of the same act," as that part of the bill amending the Clayton Act replied (80 Cong. Rec. 9421):

> "Of course it is, *but it is not a part of the Clayton*

Act as amended by section 2 [Section 1 of the Robinson-Patman Bill]." (Emphasis added.)

Representative Patman, co-author of the Robinson-Patman Act, in his testimony before a subcommittee of the House Judiciary Committee on May 19, 1959, stated that section 3 was definitely not a part of the Clayton Act or one of the antitrust laws. He said (Hearing on House H.R. 7905, Serial No. 14, Part 5, p. 48, 81st Cong. 2nd sess.):

> "* * * section 3 of the Robinson-Patman Act has never been added to the list of laws designated as 'antitrust laws' in section 1 of the Clayton Act.
>
> "* * * The House did not put section 3 in that act, it was put in in the Senate. Senator Borah and Senator Van Nuys were the authors, it was put in and in conferences, to get a bill, we agreed for it to stay in. Since that time section 3 has not been carried as part of the antitrust laws. It should be. I hope you will consider making it clear in this bill."

This legislative history clearly discloses that section 3 was introduced as a separate criminal provision, not a part of or an amendment to the Clayton Act.[1]

The question of treble damages was raised in both the House and the Senate during consideration of the Conference bill but only in the sense that if the same act violated both section 3 of the bill and section 1 of the bill (the latter of which amended Section 2 of the Clayton Act) the violator

[1] In Evans, "Anti-Price Discrimination Act of 1936", 23 Va. L. Rev. 140, after an exhaustive review of the legislative history of the Robinson-Patman Act, the author concluded (p. 150):

"The joining of the Borah-Van Nuys Bill, which in no way amends the Clayton Act, with the Patman Act leads to an extraordinary result. Section 1 of the Patman Act, becomes Section 2, et seq., of the Clayton Act, and must be read with other sections of that Act. Section 3, the Borah-Van Nuys Bill, remains a separate penal statute apart from all other anti-trust legislation, including Section 2 of the same Act."

would be subject to treble damages for the Clayton Act violation and also to criminal prosecution for the violation of section 3.

For example, the following colloquy took place between Representatives Hancock and Celler during consideration of the Conference bill on the floor of the House (80 Cong. Rec. 9420):

> "MR. HANCOCK *of New York:* If a vendor is found guilty of discrimination as provided in this bill, is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?
>
> MR. CELLER: If he violates the Borah-Van Nuys provision or the other provision of the bill, he is subject to penalties of a criminal nature and has committed an offense.
>
> MR. HANCOCK *of New York:* Would he also be liable for triple damages?
>
> MR. CELLER: And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue."

This change shows that in Mr. Celler's mind the treble damage remedy under the Clayton Act was separate and distinct from the criminal penalties of section 3 of the Robinson-Patman Act. The gentlemen were discussing discriminations in price which are unlawful under section 2 of the Clayton Act as well as under the first clause of section 3 of the Robinson-Patman Act. The same act of discrimination could be a violation of both sections subject to treble damages under the Clayton Act and also to criminal penalty under section 3.

Mr. Celler was a member of the House Conferees but in the debate from which the above excerpts were taken he was

arguing against approval of the report of the conferees on the ground that the inclusion of the Borah-Van Nuys provision created serious inconsistencies on the subject of discrimination and in fact he was objecting to the criminal penalties set up in the Borah-Van Nuys provision. That the same act of price discrimination would violate both section 2 of the Clayton Act as amended and the first clause of the Borah-Van Nuys provision as distinguished from the second and third clauses thereof was the basis of his opposition. The following exchange illustrates this (80 Cong. Rec. 9420):

> "MR. BOILEAU: I understand the Borah-Van Nuys is a separate and distinct section from the House provision, and some of the conferees on the part of the House have stated to me that there is no inconsistency and that the House provisions prevail, but that the Borah-Van Nuys amendment is an additional remedy.
>
> MR. CELLER: (After asking Mr. Boileau to read and compare Sections 1, 2, and 3 of the proposed bill) Also, let me point out, this bill is an amendment to the Clayton Act which provides that anyone aggrieved by any discrimination in price or discount or allowance can sue and recover treble damages from the person guilty of the discrimination. In addition, *for the single act of discrimination*, to the treble damages, the business man accused can by Section 3 of this bill, be hailed to Court and fined $5,000 or imprisoned for 1 year. I ask you to think carefully before you accept such a bill with such penalties. (Emphasis added.)

At another point Representative Miller exchanged views with Representatives Massingale and Hancock of New York as follows (80 Cong. Rec. 9421):

> "MR. HANCOCK *of New York*: Is it not perfectly clear that any vendor who discriminates in price between purchasers is guilty of a crime and is also subject

to triple damages to anyone who claims to be aggrieved?

MR. MILLER: That is true; but the criminal part is included in section 3 and section 3 only.

MR. HANCOCK of New York: But it is part of the same act?

MR. MILLER: Of course it is; *but it is not a part of the Clayton Act as amended by section 2.* It ought to be, as far as that is concerned, if a seller willfully discriminates." (Emphasis added.)

Again the gentlemen were discussing the fact that the same act of discrimination could violate both section 2 of the Clayton Act as amended and be subject to treble damage thereunder and the first clause of section 3 of the Robinson-Patman Act and be subject to its criminal penalties. Mr. Miller, who was a member of the House Conferees, was supporting the Conferee's report and urging its acceptance. That Mr. Miller understood it was not the purpose of Congress to create a treble damage remedy for violation of section 3 of the Robinson-Patman Act is clear from his remarks just prior to his exchange with Mr. Hancock quoted immediately above. The following colloquy occurred between Mr. Massingale and Mr. Miller (80 Cong. Rec. 9430):

"MR. MASSINGALE: Does the bill as agreed to by the conferees carry the penalty of treble damages and also a penalty under the criminal law?

MR. MILLER: The penalty of treble damages is the old law. In other words, we made no change in that particular provision of the Clayton Act. Section 3, which the gentleman from New York talks about, is the Borah-Van Nuys amendment, and that is the criminal section of this bill. The first part of the bill has nothing to do with criminal offenses. It deals primarily, in my opinion, with the authority of the Federal Trade Commission to regulate and enforce the provisions of Sec-

tion 2 of the Clayton Act as amended. The section 3 in the bill is placed in an effort to make the criminal offense apply only to that particular section, and I believe that is a reasonable construction, if you will look at the bill."

The Conferees as well as Congress deliberately and intentionally refrained from making any change in the treble damage provisions of the Clayton Act. It would have been a simple matter to have amended section 4 of the Clayton Act so as to include the Borah-Van Nuys provision. But Congress having failed to do so, it is respectfully submitted that the courts are not at liberty to supply a remedy which Congress expressly refrained from providing.

In the Senate in the debate on the Conference report, Senator Vandenburg asked the following question of Senator Van Nuys, one of the authors of the provision involved herein (80 Cong. Rec. 9903):

> MR. VANDENBURG: Mr. President, I should like to ask the Senator from Indiana one or two questions about the conference report.
>
> The fact has been called to my attention that section 3 of the bill, as agreed upon in conference, makes certain discriminations punishable by fine and also subject to treble damages, while similar discriminations under section 2 (b) would be subject to rebuttal by showing, for instance, that a reduced price was made in good faith to meet an equally low price of a competitor. In other words, it is asserted to me that the defense allowed under section 2 (b) is not permitted under section 3, although the act or the offense would be the same.
>
> MR. VAN NUYS: I think the Senator is mistaken there. The proviso to which he refers is simply a rule of evidence rather than a part of the substantive law.

> If a prima-facie case is made against an alleged unfair practice, the respondent may rebut the prima-facie case by showing that his lower prices were made in good faith to meet the prices of a competitor. That is a rule of evidence rather than substantive law."

Again this language does not support the contention that section 3 permits private treble damage actions. It was recognized throughout the debates that the same act of price discrimination could be subject to treble damages under section 2 of the Clayton Act as amended and also to criminal penalty under section 3 of the Robinson-Patman Act. Mr. Vandenburg's question was concerned with whether the good faith defenses provided for in section 2 of the Clayton Act as amended would be available under section 3. In his answer Mr. Van Nuys addressed himself to that question alone.

The legislative history of the Robinson-Patman Act clearly establishes that no private action for treble damages may be maintained for injuries caused by violation of section 3 of that Act. As noted by the Court of Appeals for the Seventh Circuit in *Nashville Milk Co.* v. *Carnation Co.*, 238 F.2d 86, 89 (R. 39):

> "The legislative history is convincing that there was no intention by Congress for Section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act. * * *"

The 1950 statement of Mr. Patman and the 1936 statements of Messrs. Miller, Utterback and other Congressmen remove all possible doubt as to what was Congress' purpose and what it did.

D. The District Court Correctly Followed the Sounder View in Denying a Private Cause of Action Under Section 3.

The sounder reasoning as well as the more persuasive authorities support the decision of the district court herein (R. 8-27) and the decision of the Court of Appeals for the Seventh Circuit in *Nashville Milk Co. v. Carnation Co.*, 238 F.2d 86 (R. 35-41).

In addition to the opinions of the Court of Appeals for the Seventh and Tenth Circuits, the issue has also received the attention of the Court of Appeals for the District of Columbia in *National Used Car Market Report Inc. v. National Auto. Dealers Assn.*, 108 F.Supp. 692 (D. D.C. 1951), aff'd, 209 F.2d 359 (1952). The district court in dismissing a complaint under section 3 of the Robinson-Patman Act said (p. 694):

> "The Court is inclined to the view that no action for damages or injunction is maintainable under the section in question."

The Court of Appeals in affirming said (p. 359):

> "We think the District Court was right, for reasons it gave, in dismissing" the section 3 count.

Other courts have expressed the belief that no private right of action exists for violation of section 3 of the Robinson-Patman Act. In *Hershel California Fruit Products Co. v. Hunt Foods*, 119 F.Supp. 603 (N.D. Cal. 1954), the court expressed "grave doubts" as to whether section 3 is one of the "antitrust laws" so as to provide a private action for its violation.

The court below relied heavily upon the opinion in

Balian Ice Cream Co. v. Arden Farms, 94 F.Supp. 796 (S.D. Cal. 1950), and the authorities cited therein. However, upon analysis none of the authorities relied upon involved the specific issue presented here.

In the *Balian* case Judge Yankwich relies upon and discusses eight cases, five of which are decisions by courts of appeals (94 F.Supp., 802).

Biddle Purchasing Co. v. Federal Trade Commission, 96 F.2d 687 (2nd Cir. 1938), did not involve section 3 of the Robinson-Patman Act but was limited to illegal brokerage fees under section 2(c) of the Clayton Act as amended (15 U.S.C. Sec. 13(c)), which section was clearly amended by the Robinson-Patman Act.

Oliver Bros., Inc. v. Federal Trade Commission, 102 F.2d 763 (4th Cir. 1939), also only involved section 2 of the Clayton Act as amended, specifically sections 2(a), (b), (c), (d) and (f) thereof (15 U.S.C. Secs. 13(a), (b), (c), (d), and (f)), all of which were expressly amended by section 1 of the Robinson-Patman Act. Again section 3 of that Act was not involved.

Southgate Brokerage Co. v. Federal Trade Commission, 150 F.2d 607 (4th Cir. 1945), was concerned only with illegal brokerage fees under section 2(c) of the Clayton Act as amended (15 U.S.C. Sec. 13(c)) and section 3 was not involved. This is equally true of *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F.2d 667 (3rd Cir. 1939), and *Webb-Crawford Co. v. Federal Trade Commission*, 109 F.2d 268 (5th Cir. 1940). No question of any private right of action under section 3 of the Robinson-Patman Act was involved in any of these cases. General statements made in these cases that the Robinson-Patman Act amended the Clayton Act refer only to section 1 of the

Robinson-Patman Act which admittedly did amend the Clayton Act.

Judge Yankwich in the *Balian* case also referred to several district court cases which are equally unpersuasive. *Atlanta Brick Co. v. O'Neal*, 44 F.Supp. 39 (E.D. Tex. 1942) did involve section 3 of the Robinson-Patman Act and the court took the position without the citation of any authority or discussion of the legislative history of the Act that since the section made certain acts unlawful a person injured could invoke its provisions. This is contrary to the great weight of authority and the principle that when Congress creates a new offense and provides a penalty that penalty is exclusive. The court admitted, however, that the section does not by its terms grant a private right of action for treble damages and in fact it denied an action for treble damages, holding only that an action for compensatory damages could be maintained under section 3. The court did not hold that section 3 was within the provisions of section 4 of the Clayton Act (15 U.S.C. Sec. 15) creating a treble damage remedy for violation of the "antitrust laws".

A. J. Goodman v. *United Lacquer Mfg. Co.*, 81 F.Supp. 896 (D.C. Mass. 1949), did not hold that a private right of action exists for a violation of section 3, for the complaint in that action was dismissed on another ground. The most that can be said for the language used in this case is that the court believed that the complaint set forth sufficient facts to show a violation of section 3. The existence of a private right to sue for treble damages under section 3 was not at issue.

Judge Yankwich in the *Balian* case overlooked the plain language, text and punctuation of the Robinson-Patman Act and its legislative history. The decision is in error and will not withstand close analysis.

The case of *Spencer* v. *Sun Oil Co.*, 94 F.Supp. 408 (D.C. Conn. 1950), is equally unpersuasive. The issue of whether section 3 of the Robinson-Patman Act affords private relief was raised but the court resolved it in one sentence without the citation of any authority. The court completely ignored the legislative history of the Act as well as its form, punctuation and wording. The decision of this issue was not necessary to the case because the court dismissed the complaint on its merits for the reason that the facts alleged did not come within the purview of section 3.

Myers v. *Shell Oil Co.*, 96 F.Supp. 670 (S.D. Cal. 1951), relies upon the *Balian* case and was decided by a different judge in the same district in which the *Balian* case arose. It merely follows *Balian* opinion and has no more validity than that case.

The question at issue herein was not raised in *Moore* v. *Mead's Fine Bread Company*, 348 U.S. 115 (1954), and the dicta in the case of *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1946) is, of course, not dispositive.

As shown by the able opinion of the district court herein (R. 8) and of the Court of Appeals of the Seventh Circuit in *Nashville Milk Co.* v. *Carnation Co.* (R. 37n), the question of whether section 3 permits a civil action for treble damages was not raised in the *Mead* case in any court. It was neither briefed nor argued in that case. The Attorney General's National Committee to Study the Antitrust Laws in its report dated March 31, 1955, properly evaluated the effect of the *Mead* case on this question, stating (p. 200):

> "There are persisting basic questions as to whether the prohibitions of Section 3 convey a sufficiently clear warning or proscribed criminal conduct to meet the Constitution's safeguards of fair and adequate notice to prospective defendants. While some courts have

confessed serious doubt of Section 3's constitutionality; others have sustained the Act. But no appellate court to date has rendered an authoritative statutory interpretation, either defining the section's status as a privately enforceable antitrust law or settling its constitutional validity.'"

"'In a recent decision, the Supreme Court's reversal of a Court of Appeals' adverse ruling on a private plaintiff's cause of action evidently assumed but did not expressly decide both points. *Moore* v. *Mead*, 348 U.S. 115 (1954). Since neither litigant raised the issues, we do not construe the Court's decision as controlling legal authority on questions not at bar or adjudicated.'"

The decision in the *Mead* case therefore lends no support to respondent's contention.

The quotation from the opinion in *Bruce's Juices* case, *supra*, relied on by the court below (R. 33) does not constitute pursuasive authority. It is dictum not necessary for a decision and not, therefore, the result of careful analysis and research requisite for a decision. It also does not mean that a violation of section 3 as such would give rise to an action for treble damages. The alleged violations in *Bruce's Juices* were limited to discriminatory discounts which would sustain a treble damage action under section 2 of the Clayton Act as amended (15 U.S.C. Sec. 13) as well as violate the first clause of section 3 of the Robinson-Patman Act. This statement means no more than that the same act of discrimination may violate both sections and be subject to the penalties as provided in those sections.

Legal scholars and commentators have likewise concluded that Section 3 is not within the provision of section

4 of the Clayton Act for treble damages.' Thus Vol. 50 Harvard Law Review 106, 121-122 (1936) states:

> "Since Section 3 is a criminal statute, it will be enforced by the Department of Justice. While ordinarily a violation of Section 3 is also a violation of Section 1, the offender under Section 3 is not subject to triple damage litigation, for that section is not part of the Clayton Act."

Werne, *Business and the Robinson-Patman Law* (1938) states (p. 63):

> "The department of Justice has jurisdiction to enforce the Act by Civil proceedings for injunctions under Section 1, and by criminal proceedings under Section 3. Private parties may also bring suits under Section 1 (but not Section 3) for injunctions or for treble damages."

In 85 University of Pennsylvania Law Review, 306, 312 (1936) it is said:

> "Section 3 of the Act makes certain practices punishable by fine, imprisonment, or both. Although introduced as an amendment to Section 2 of the Clayton Act, as finally enacted it is independent thereof, so that for violations of its provisions the offender is subject only to the penalties just mentioned."

22 Washington University Law Quarterly, p. 153 at 182 (1937) observes:

> "Since this provision (section three) is not technically a part of the Clayton Act, there can be no civil liability for its violation, in any event; and the only

[1] Cf. "Regulation of Business—Civil Action Under Section 3 of the Robinson-Patman Act"; 55 Mich. L. Rev. 845 (1947), suggesting that whether or not a private action is available under Section 3, the statute contains infirmities which might lead to its unconstitutionality. Petitioner raised the question of constitutionality of Section 3 in the district court, which declined to decide it in light of its disposition of the case although it did indicate "grave doubts" with respect to the constitutionality of Section 3 (R. 13).

method by which it may be enforced is by a criminal action for the imposition of the penalties therein provided."

22 American Bar Association Journal 593 (1936) at page 649, n. 14 further states:

"No means of enforcing Section 3 is expressly provided in the Robinson-Patman Act except criminal actions by the Attorney General. Except where such right are expressly given no private litigant can enforce laws of this character. See *Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165. The provisions of the Clayton Act giving such a remedy for violations of the anti-trust laws do not apply to Section 3 because Section 3 is not made part of Section 2 of the Clayton Act as amended, and so is not technically part of the 'anti trust laws' as defined in the Clayton Act."

In 41 Minn. L. Rev. 359 (1957) the author states (pp. 363-4):

"* * * Undoubtedly the private treble damage action, in supplementing government enforcement, is an integral part of the antitrust procedure. But the gravity of the treble damage judgment and the possibility of harassing and non-meritorious litigation based upon the uncertain prohibitions of section three suggest that in lieu of congressional authorization of civil action in specific words, the objectives of competition might be best served by placing the power of suit under section three only in the hands of government enforcement agencies."

In 26 Fordham L. Rev. 126 (1957) it is stated (p. 130):

"To allow a suit for treble damages and injunctive relief for a breach of section 3 of the Robinson Patman Act would lead to an incongruous result. Section 3 is broader in its application to business transactions than is section 2. If section 3 supports private action under

sections 4 and 16 of the Clayton Act along with its own criminal sanction, section 2 is rendered superfluous. Such a result could hardly have been intended.".

In "Criminal Penalties, Section 3 of the Robinson-Patman Act—'Dead Horse' or 'Sleeper'?", by C. Brien Dillon, ABA Section of Antitrust Law, April 5-6, 1956, p. 112, after reviewing the text, punctuation and form of Section 3 and its legislative history the author concludes (p. 117):

> "It seems fair to conclude, then, that Section 3 is a separate criminal statute which deals with many of the same items dealt with by Section 2 of the Clayton Act, but that it is not privately enforceable by a treble damage action.".

The Attorney General's National Committee to Study the Antitrust laws is also in wholehearted agreement with the proposition that section 3 does not and should not afford a private right of action for treble damages, stating in its Report of March 31, 1955, p. 200:

> "We believe that acceptance of Section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support neither in the legislative intent nor overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all, should be accessible only to the Government which has already sought to limit its application."

On principle the district court herein and the Court of Appeals for the Seventh Circuit reached the sound conclusion. If section 3 of the Robinson-Patman Act affords private relief merely because it deals generally with anti-

trust matters as the court below held (R. 31), this argument would be equally applicable to the Federal Trade Commission Act (15 U.S.C. Sec. 45, et seq.) as well as to any other act dealing generally with the regulation of business heretofore or hereafter enacted by Congress even though Congress does not provide a private remedy under such laws.

It has been expressly held that no private action for a violation of the Federal Trade Commission Act may be maintained even though that Act prohibits "unfair methods of competition" in interstate commerce. *Atlanta Brick Co. v. O'Neal*, 44 F.Supp. 39, 42 (E.D. Tex. 1942); *Samson Crane Co. v. Union National Sales*, 87 F.Supp. 218, 221 (D.C. Mass. 1949), aff'd 180 F.2d 896 (1st Cir. 1950); *National Fruit Products Co. v. Dwinell-Wright Co.*, 47 F.Supp. 499, 504 (D.C. Mass. 1942).

Certainly the policy behind the desire for private enforcement of the antitrust laws[1] is no stronger with respect to section 3 of the Robinson-Patman Act than as to section 5 of the Federal Trade Commission Act. The Congressional intent or "proliferation of purpose"[2] as clearly expressed in sections 1 and 4 of the Clayton Act and section 3 of the Robinson-Patman Act is that no private cause of action is created by the latter statute. Congress apparently believed that section 3's vague proscriptions would be better enforced by the Department of Justice than by private individuals since other statutes also condemn price discrimina-

[1] See 70 Harv. L. Rev. 1390, 1393 (1957), where the author advances the argument that private litigants should be enabled to enforce section 3 because the Justice Department has not been prosecuting violations of this statute. The reasons for that department's forsaking of this law may be many, including the law's vagueness, a possible recognition that it does not further the public interest, etc. But whatever the reasons, this scarcely warrants the establishment of private enforcement procedures by court order.

[2] This apt phrase is used by Mr. Justice Frankfurter in "Some Reflections on the Reading of Statutes", 47 Col. L. Rev. 527, 538 (1947) to describe the legislative aim, policy and purpose in drafting the statute.

tion and predatory pricing activities.[*] Private individuals accordingly are not without remedy for damage to their business or property occasioned by these practices. Authorizing private suits under section 3 might only encourage harassing and non-meritorious litigation based upon its uncertain proscriptions.

We respectfully submit that a court is not at liberty to do what Congress did not do. The question presented is what Congress did, not what it could have done or should have done. Courts are not at liberty to enlarge a statute or change its meaning. As Mr. Justice Cordoza said in *Anderson v. Wilson*, 289 U.S. 20 (1933) at page 27:

> "We do not pause to consider whether a statute differently drawn would yield results more consonant with fairness and reason. We take this statute as we find it."

CONCLUSION

For the reasons state, petitioner respectfully submits that the decision of the court below should be reversed.

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[*] Section 2 of the Clayton as amended (15 U.S.C. Sec. 13) also prohibits price discriminations. The Government has given the first clause of section 3 a very restrictive meaning. See Report of the Attorney General's National Committee to study the Antitrust Laws, March 31, 1955, pp. 199-201.

Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555 (1931); *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2nd Cir. 1929), cert. den. 279 U.S. 858 (1929); *National Nut Co. v. Kelling Nut Co.*, 61 F. Supp. 76 (N.D. Ill. 1945).

Petitioner's Reply Brief

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a corporation

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vs.

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Bankruptcy for
FRANK MELVIN THOMPSON, BANKRUPT,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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PETITIONER'S REPLY BRIEF

In Part III of his brief (pp. 23-29), respondent contends that the express specification of certain antitrust laws in Section 1 of the Clayton Act, 38 Stat. 370, was not intended to exclude later enactments in the antitrust field. Petitioner submits this brief in answer to such contention.

In Section 1 of the Clayton Act the following Acts are defined as "antitrust laws":

1. The Sherman Act (Act of July 2, 1890).

2. Portions of the Wilson Tariff Act (Act of August 27, 1894).

3. The Act amending the Wilson Tariff Act (Act of February 12, 1913), and

4. The Clayton Act ("this Act").

Petitioner contends that the specific mention of these acts necessarily excludes all other acts not enumerated, including the Federal Trade Commission Act (15 U.S.C., Sec. 41 *et seq.*) and all portions of the Robinson-Patman Act not amendatory of the Clayton Act.

All of the courts passing upon this question to date have adopted petitioner's view and have held that the enumeration of specific acts in Section 1 of the Clayton Act excludes all other acts not so enumerated therein. This includes both the District Court (R. 14-15) and the court below (R. 31) as well as the Court of Appeals for the Seventh Circuit in *Nashville Milk Co.* v. *Carnation Co.*, 238 F.2d 86, 88 (1956) (R. 37), and the opinion in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796, 798 (S.D. Cal., 1950).

The very fact that no court to date has adopted respondent's contention is persuasive evidence of its lack of merit.

However, further evidence of the absence of merit in respondent's position is found in the fact that Congress has, since the enactment of Section 1 of the Clayton Act in 1914, uniformly treated Section 1's enumeration of certain antitrust laws as being exclusive of all other antitrust laws. By way of example the following acts may be referred to:

In Section 29 of the Marine Insurance Ass'n Act (41 Stat. 1000, 46 U.S.C., Sec. 885) Congress treated the definition of antitrust laws contained in Section 1 of the Clayton Act as exclusive, stating:

> "(b) Nothing contained in the 'antitrust laws' *as designated in* section 1 of an Act entitled * * * [the Clayton Act] shall be construed as declaring illegal an association entered into by marine insurance companies for the following purposes * * *" (Emphasis added.)

In Sec. 414 of the Civil Aeronautics Act (52 Stat. 1004, 49 U.S.C., Sec. 494) Congress also treated the designation of antitrust laws in Section 1 of the Clayton Act as exclusive, providing:

> "Sec. 414. Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws,' *as designated in* section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, in so far as may be necessary to enable such person to do anything authorized, approved, or required by such order." (Emphasis added.)

In the Bulwinkle Act (62 Stat. 472, 49 U.S.C., Sec. 5b) Congress again incorporated the definition of the antitrust laws as contained in Section 1 of the Clayton Act as follows:

> "(B) The term 'antitrust laws' *has the meaning assigned* to such term in Section one of the Act entitled * * * [the Clayton Act]." (Emphasis added.)

Furthermore, when Congress desires to refer to acts not enumerated in Section 1 of the Clayton Act as antitrust laws

it expressly enumerates such other acts without reference to the exclusive enumeration found in Section 1 of the Clayton Act. Thus in Section 207 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 391, the term "antitrust laws" is defined as follows:

> "As used in this section the term 'antitrust laws' includes the Act of July 2, 1890 (ch. 647, 26 Stat. 209) [Sherman Act] as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730) [Clayton Act] as amended; the Federal Trade Commission Act (38 Stat. 717), as amended; and sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570) [Wilson Tariff Act] as amended."

In the McCarran Insurance Act (59 Stat. 39, 15 U.S.C., Sec. 1013) Congress again refrained from referring to Section 1 of the Clayton Act when it desired to include antitrust laws (including the Robinson-Patman Act) other than those expressly enumerated in Section 1, stating:

> "Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof."

It is highly significant that Congress in enacting the McCarran Act distinguished between the Robinson-Patman Act and the Clayton Act, treating them as separate statutes and not as though the Robinson-Patman Act amended the Clayton Act or was a part thereof (except, of course, as to Section 1 of the Robinson-Patman Act which does amend the Clayton Act).

Furthermore, if respondent's contention is sound, all acts of Congress in the general "antitrust" field would fall

within the definition of Section 1, and the treble damage remedy would be available for their violation. It would not be necessary that this remedy be specifically provided by Congress in any such act. However, in the Revenue Act of 1916, 39 Stat. 795, 15 U.S.C. 72, Congress prohibited the importation into the United States, and the sale therein, of articles at substantially less than actual market value with the intent of injuring industry in the United States or with the intent of restraining or monopolizing any part of trade or commerce. This is certainly an "antitrust law".

That Congress considered the definition of "antitrust laws" in Section 1 of the Clayton Act to be exclusive is shown by the fact that the treble damage remedy was specifically incorporated in these provisions of the Revenue Act of 1916. Under respondent's theory, this would not have been necessary, since the definition in Section 1 of the Clayton Act would have embraced these provisions so as to make the treble damage provisions available under Section 4 of the Clayton Act. Obviously, Congress did not so consider it. The only justification for specifically incorporating the treble damage remedy in these provisions of the Revenue Act of 1916 is that Congress believed that the definition of the "antitrust laws" in Section 1 of the Clayton Act was exclusive and that no treble damage remedy would exist for violation of these provisions of the Revenue Act of 1916 unless a specific provision therefor was made.

Nor did Congress, in defining "antitrust laws" in Section 1 of the Clayton Act, add the phrase "and other Acts of Congress amending or supplementing said Acts" or words of like import. When Congress desires that a definition have a non-exclusive meaning it incorporates such language in the statute, as was done in the Panama Canal Act, 37 Stat. 567, 15 U.S.C., Sec. 31 ("and other Acts of

Congress amending or supplementing said Acts"), in the Expediting Act, 32 Stat. 823, 15 U.S.C., Sec. 28 ("or any other Acts having a like purpose that hereafter may be enacted"), in the Shipping Act of 1916, 30 Stat. 733, 46 U.S.C., Sec. 14 ("and amendments and Acts supplementary thereto"), in the Communications Act of 1934, 48 Stat. 1087, 47 U.S.C., Sec. 313 ("all laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts or agreements in restraint of trade"), and in the Civil Aeronautics Act, 52 Stat. 1004, 49 U.S.C., Sec. 494 ("and of all other restraints or provisions made by, or imposed under, authority of law * * *").

We believe that the above statutes referred to by example make it abundantly clear that Congress intended to state an exclusive definition of "antitrust laws" in Section 1 of the Clayton Act. Respondent's citation of authorities relating to other acts such as the Federal Farm Loan Act of 1916 (39 Stat. 360, 380), and the Revenue Act of 1936 (44 Stat. 9, 17) (Respondent's Brief, pp. 23-6), clearly have no relevance to Section 1 of the Clayton Act; nor does respondent's extensive quotation from the legislative history of the Clayton Act (Br. pp. 26-9) demonstrate that Congress did not intend Section 1 of the Clayton Act to state an exclusive enumeration of the antitrust laws for which the treble damage remedy was provided in Section 4 of the Clayton Act.

CONCLUSION.

For the reasons stated herein and stated in its main brief, petitioner respectfully submits that Section 1 of the Clayton Act contains an exclusive enumeration of the antitrust laws for which private civil remedy lies and since Section 3 of the Robinson-Patman Act is not one of the

antitrust laws so enumerated, it not being a part of the Clayton Act, petitioner asks that the judgment of the court below be reversed.

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HARRY V. VANCE, Trustee in
Bankruptcy for
FRANK MELVIN THOMPSON, BANKRUPT,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Brief of Respondent

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In The

Supreme Court of the United States

October Term, 1957

No. 69

SAFEWAY STORES, INCORPORATED,
a corporation

Petitioner,

vs.

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BRIEF OF RESPONDENT

REFERENCE TO REPORTS OF LOWER COURTS

The opinion of the United States District Court for the District of New Mexico is reported in 137 F. Supp. 841 and reproduced in the Record beginning at page 8. The opinion of the Court of Appeals, Tenth Circuit, is reported in 239 F. 2d. 144 and is printed in the Record beginning at page 30.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was dated November 6, 1956, and entered on that date (R. 34). The Petition for Rehearing was filed November 26, 1956, (R. 34) and denied December 4, 1956, (R. 42). Petition for Certiorari was filed January 22, 1957, and granted by this Court March 4, 1957, (R. 42).

Jurisdiction of this Court was invoked by Petitioners under 28 USC, Sec. 1254 (1).

THE QUESTION PRESENTED FOR REVIEW

The question for review is whether a person injured in his business and property by violation of Section 3 of the Robinson-Patman Act (49 Stat. 1528, 15 USC 13a) may sue for and recover treble damages for such injury under Section 4 of the Clayton Act (38 Stat. 731, 15 USC 15).

STATUTORY PROVISIONS INVOLVED

The Statutory provisions involved, quoted in Appendix I of this brief, are as follows:

Robinson-Patman Act,
49 Stat. 1528

Clayton Act, Section 4,
38 Stat. 731, 15 USC 15

Clayton Act, Section 1,
38 Stat. 730, (1st paragraph)

Title 15 USC 12 (1st paragraph)

STATEMENT OF THE CASE

The District Court dismissed Plaintiff's first Amended Complaint, which may be summarized as follows (R. 1-5):

Plaintiff Vance is the Trustee in Bankruptcy of one Frank Melvin Thompson, who operated a retail grocery store in Albuquerque, New Mexico from the year 1948 until the month of May, 1955.

Defendant Safeway Stores, Inc., is the second largest food chain in the United States, operating more than two thousand supermarkets in the United States and in Canada, with sales in 1954 of over $1,600,000,000, employing over 49,000 persons, and owning and operating various warehouses, bakeries, candy plants, milk plants and similar food processing establishments. Defendant ships its food products in interstate commerce from its processing and warehousing facilities described in the Complaint to its supermarkets in Albuquerque, New Mexico, where they are sold to consumers and others. (R.2)

Defendant is the dominant distributor and retailer of food products in West Texas and New Mexico, supplying its stores in New Mexico from warehouse facilities it operates in El Paso, Texas. By reason of Defendant's financial resources, extensive processing and warehousing, its facilities located throughout the United States, and its dominant position as a food distibutor and retailer in West Texas and New Mexico, defendant was and is able to destroy competition in the City of Albuquerque at the will of its management. (R. 3).

Between September 1, 1954, to the date of filing of the Complaint (November 15, 1955), defendant, at the direction of its management located in El Paso, Texas, and Oakland, California, sold goods in the course of interstate commerce in its Albuquerque stores, at prices substantially lower than prices exacted by defendant for the same goods in other cities and towns in New Mexico and elsewhere in the United States, for the purpose of destroying competition in the grocery business in Albuquerque, in violation of Section 3

of the Robinson-Patman Act (15 USC 13a) and Section 4 of the Clayton Act as amended (15 USC 15) (R. 3). Defendant further sold goods in the course of such commerce in the city of Albuquerque at unreasonably low prices during the period mentioned, for the purpose of destroying competition in said city, in violation of the statutes cited (R. 4). Defendant engaged in a policy of selling certain staple articles of food, important in the budget of every housewife, and constituting a substantial portion of total volume of sales in the industry, at unreasonably low prices over a period of over six months, with the knowledge and intent that such action would destroy a number of defendant's smaller competitors in Albuquerque. As a proximate result of defendant's illegal actions a number of defendant's competitors, including Thompson, were destroyed. Further, as a proximate result of defendant's unlawful actions, Thompson lost business and profits in 1954 and 1955, and in May, 1955, he became insolvent and lost his business and all his non-exempt personal and real property.

The Complaint concludes with a prayer for judgment for $45,000.00 trebled, and for other relief.

The proceedings in the District Court upon dismissal of Plaintiff's First Amended Complaint and the proceedings on appeal to the Circuit Court of Appeals were as stated in the Petitioner's brief, pages 4 and 5.

SUMMARY OF ARGUMENT

I.

The text of the Robinson-Patman Act indicates that it was intended in its entirety to amend the Clayton Act, and as an amendment of the Clayton Act, it is one of the "anti-trust laws" specified in Section 1 of the Clayton Act (38

Stat. 730) as a result of the violation of which a person injured may recover treble damages under Section 4 of the latter act." (38 Stat. 731, 15 USC 15).

II.

Without regard to the express langauge of the Robinson-Patman Act, its history, studied in the light of experience under the Sherman and Clayton Acts, indicates that it was amendatory of existing antitrust laws, particularly the Clayton Act. The Robinson-Patman Act was a continuation of the Congressional attack upon the evils of combinations, monopolies and restraints of trade, with particular emphasis upon the widespread practice of the chain stores of soliciting special discounts and allowances, and of engaging in local price wars. See *Final Report on the Chain-Store Investigation*, Sen. Doc. No. 4, 74th Cong., 1st Sess. (1934); American Law Institute, *Price Discrimination*, 1953 Ed., pp. 8 to 12. The Robinson-Patman Act was particularly designed to protect the independent merchant and the public from exploitation by his chain competitor. (Rep. Patman, 79 *Cong. Rec.* 9078). Section 3 of the Act prohibited not only practices which were expressly the subject matter of existing antitrust laws, but also practices, such as locality discrimination and sale of goods at unreasonably low prices with the intent to destroy competition, which Congress had condemned in debates on earlier antitrust statutes, but which had not been adequately covered under such earlier laws. Section 3 should, therefore, in the light of history, be considered an integral part of an act, which, as a whole, amended existing antitrust laws.

III.

The statement in Section 1 of the Clayton Act, 38 Stat. 370, that "antitrust laws" as used therein "includes"

the acts specifically referred to in that section (being all the then existing laws dealing with antitrust) was not intended by Congress as an all-embracing definition which would exclude later enactments. See *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). The debate on certain sections of the Clayton Act appearing in the Congressional Record in Volume 51, page 16319, makes it clear that the specification of the then existing antitrust laws contained in Section 1 was not inserted with the intention of excluding any act which would ordinarily be classified as an antitrust act, but to ensure that enforcement orders of the Federal Trade Commission would not have the effect of absolving a violator from liability under other provisions of the antitrust laws.

IV.

Inclusion of Section 3 of the Robinson-Patman Act as one of the antitrust laws in the codification of Section 1 of the Clayton Act published in 1940 (15 USC § 12) and its continuation in subsequent codes constitutes an established administrative interpretation which is entitled to great weight. Petitioner's characterization of this as a "codification error" (Br. 14) begs the question presented for review.

V.

The Federal district courts have almost without exception held Section 3 of the Robinson-Patman Act as one of the "antitrust laws" for the violation of which the treble damage remedy is available to a person injured. In two cases in which the issue was not directly before it, this Court has indicated agreement with that construction. *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 750 (1947), *Moore v. Mead's Fine Bread*, 348 U.S. 115, 118 (1954).

ARGUMENT

I.

THE ROBINSON-PATMAN ACT IN ITS ENTIRETY AMENDS THE CLAYTON ACT.

If the Robinson-Patman Act in its entirety amends the Clayton Act (or any other "antitrust law"), then of course it is part and parcel of the law it amends and each of its parts is an "antitrust law", the violation of which subjects the guilty part to treble damages under Section 4 of the Clayton Act.

Petitioner argues that the text, punctation and structure of the Robinson-Patman Act indicate that it was not intended as an amendment of the Clayton Act (Br. 6-20). The argument rests upon the assumption that the language of the enacting clause expressly limits the amendment of the Clayton Act to Section 2 thereof (Br. 19), that only the portion enclosed in quotation marks can constitute an amendment (Br. 17), and that the title states that the intended amendment is limited to Section 2 of the Clayton Act. (Br. 18).

A close examination of Sections 2 and 4 of the Robinson-Patman Act leads to the conclusion that the argument is clearly wrong. Section 2 of the latter act expressly refers to the Clayton Act, stating that nothing in the section shall affect rights of action or orders of the Federal Trade Commission based on Section 2 of the Clayton Act, pending prior to "this amendatory Act." It provides that in the event the Commission has reason to believe that a person subject to a cease and desist order under the Clayton Act has committed any act violative of Section 2 of the latter act "as amended by this Act", it may reopen the

original proceedings and issue a supplementary complaint, which shall be conducted as provided in Section 11 of the Clayton Act. If, upon such hearing, the Commission shall be of the opinion that any act charged in the supplementary complaint has been committed since the effective date of "this amendatory Act", in violation of Section 2 "as amended by this Act", it is directed to issue an order modifying or amending the original order to include any additional violations found. The provisions of Section 11 of the Clayton Act as to review and enforcement of orders of the Commission are to apply to such amended order.

It is thus apparent that Section 2 of the Robinson-Patman Act is amendatory to the Clayton Act. The provisions of Section 11 of the Clayton Act are expressly amended to provide that they shall apply to amended orders of the Federal Trade Commission issued under the authority of Section 2 of the Robinson-Patman Act. The latter statute in its entirety is referred to as "this amendatory Act". Similarly, Section 4 of the Robinson-Patman Act exempts co-operative associations which might otherwise be subject to Section 2 of the Clayton Act as amended by Section 1 of the Robinson-Patman Act, and which might otherwise be subject to the penalties imposed by other sections of the Clayton Act were the exemption not granted.

Both of these sections have the effect of altering the Clayton Act "to make it more complete or perfect" and to "fit it the better to accomplish the object or purpose for which it was made", and are amendatory within the definition of *United States ex rel. Palmer v. Lapp*, 244 Fed. 377, 383 (6th Cir. 1917); *First State Bank of Shelby v. Bottineau County Bank*, 56 Mont. 363, 185 Pac. 162 (1919) and other cases. See *Rupert Hermanos v. People of Puerto Rico*, 106 F. 2d 754 (1st Cir. 1939). Whether an act is amendatory of existing law is determined not by the title or by declara-

tion in the new act that it purports to amend existing law, but by an examination and comparison of its provisions with existing law. *People ex rel. Larson v. Thompson*, 381 Ill. 48, 44 N.E. 2d 899 (1942); *Auk Bay Salmon Canning Co. v. U. S.*, 300 Fed. 907, 910 (9th Cir. 1924); *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796, 799 (S.D. Cal. 1950).

Since Sections 2 and 4 of the Robinson-Patman Act are clearly amendatory of the Clayton Act, Section 3 must also be considered amendatory of that Act, since all sections of the Robinson-Patman act are integrated parts of the whole. Examination of the background of the Act supports this conclusion.

II.

THE HISTORY OF THE ROBINSON-PATMAN ACT INDICATES IT WAS INTENDED TO SUPPLEMENT AND AMEND EXISTING ANTITRUST LAWS.

This Court said in *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231, 248 (1951):

> "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monoply, which it sought to prevent.'"

As Judge Yankwich pointed out in his exhaustive opinion in *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796, 803, antitrust legislation in the United States shows a consistent attempt to achieve a maintenance of competition in our economy through the use of the power of Congress to regulate commerce between the states. The

Sherman, Clayton and Robinson-Patman Acts are successive steps in the condemnation of practices which earlier statutes failed to reach.

One of the most destructive practices which the Sherman Act failed to prevent was that of local underselling, which is precisely the practice complained of against Safeway here. The Judiciary Committee of the House of Representatives, in reporting the Clayton Act to the House on May 6, 1914, stated with respect to Section 2 as reported out to the House (H.R. Report No. 627, 63rd Cong., 2d Sess., 1914):

> "Section 2****** is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monoply in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. *** ".

Section 2 of the Clayton Act as reported out by the Committee and as originally passed by the House read in part as follows (51 Cong. Rec. 16043):

> "Sec. 2. That any person engaged in commerce who shall either directly or indirectly discriminate in price between different purchasers of commodities in the same or different sections or communities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof, or the District of Columbia or any insular possession or other place under the jurisdiction of the United States with the purpose or intent thereby to destroy or wrong-

fully injure the business of a competitor of either such purchaser or seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding $5000, or by imprisonment not exceeding one year, or by both, in the discretion of the court."

The conference bill (See 51 Cong. Rec. 16267) changed the section to read as it finally was enacted, 38 Stat. 730, as follows:

"Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce. *Provided* that nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition; *And provided further* that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

It is significant in determining whether Section 3 of the Robinson-Patman Act was intended as an amendment to the Clayton Act to note that the original Section 2 of the latter act more nearly resembles portions of the Borah-Van

Nuys provision than it does the final version of Section 2. It was apparent to many members of Congress that the conference version of Section 2 would prove to be inadequate to deal with the condition of local underselling. Senator Norris described the problem during the debate on the conference report on the Clayton Act on October 2, 1914, as follows (51 Cong. Rec. 16043):

> "Mr. President, the iniquity that this section seeks to cover is one of the worst that has been in existence in our country. It is one of the principal means by which great trusts and combinations have been built up, and by which enormous fortunes have been made at the expense of the consuming public. It was the main method by which the Standard Oil Co. gained its wealth, and its power; it is a means of discrimination that is paralyzing, that means death and destruction to honest business. The Standard Oil Co. and similar trusts that indulge in this practice have been in the habit of going into some community where they had some competition and there, regardless of cost or of anything else, under-selling their competitor until they had driven him out of business. When they had driven him out of business, or got him in such condition that they were able to buy him out, then the price was raised in that community. While it was often lowered in one community, it was raised in other communities; so that they could make up their losses and a profit besides. It has been one of the most sinful practices; and the road to these great combinations that have won wealth and power by this means has been strewn all along with the dead and withering bones of honest business, sacrified in an honest attempt to make an honest living. In the end the consuming public has always been compelled to foot the bill."

Senator Norris and Senator Clapp expressed particular dissatisfaction with Section 2 as it finally came before the Senate because the criminal provision was eliminated.

and the Senators believed that the section as reported out would not reach locality discrimination, which the House Report, supra, had expressly stated was the primary objective of Section 2.

The following remarks were made, (51 Cong. Rec. 16044-45):

"MR. CLAPP: The way that section was finally fixed by the conferees there would have been no gum for the tooth to have been imbedded in; because, outside of conference, outside of the action of the two Houses, they inserted this:

> 'Where the effect of such discrimination may be to substantially lessen competition . . .'

Not at the point where the small independent was crushed out, but in the world-wide operations of a trust whose operations encircle the globe.

MR. NORRIS: Yes.

MR. CLAPP: Consequently, with that added, there could be no offense under Section 2, because the crushing out of a man in one town would not even tend to affect the business of a world-wide operation."

Senator Clapp continued during the debate as follows, 51 Cong. Rec. 16054:

"The experience of the country under the Sherman antitrust law had disclosed three great and acute conditions. In the first place, there had been developed and disclosed this condition of local underselling. That is, a trust or combination would enter some some particular locality, put down the price of its article, until it had crushed out the local independent concern, and then restore the price, and the monopoly in that particular place would be complete. The Senator from West Virginia this morning insisted that we have no right to deal with monopoly locally. But the fact is our right to

deal with monopoly does not depend upon the locality where it is attempted to establish the monopoly, but upon the instrumentality that is used and if that instrumentality is interstate commerce, then our jurisdiction over the subject is complete and whole."

After stating that the other two evils referred to were the tying-in contract, and the occasional attitude of a trust in refusing to sell a commodity to any particular individual, the Senator continued:

"Experience had brought out these three matters in bold relief. The court had held that the tying-in contracts, if applied to patented articles, could not be reached under the Sherman antitrust law. The court had enumerated the local underselling as something to be reprehended and as a link in the chain of evidence that might lead to the conclusion that a trust existed.

"If Congress had taken these three distinct matters, which experience had disclosed as evils not fully cured by the Sherman antitrust law, declared each and every one of them to be a misdemeanor and applied a penalty, it would have met the situation for trust legislation. * * *"

As pointed out by the Federal Trade Commission in the *Final Report on the Chain Store Investigation*, *supra*, Senators Clapp and Norris were correct in their predictions. The Clayton Act was ineffective in curbing the power of the chain. The language of the original Section 2 dealt principally with competition with the discriminating seller at the manufacturing or producing level, not competition between customers of the purchaser. See *Mennen Co. v. Federal Trade Comm.*, 288 Fed. 774 (2nd Cir. 1923); but see *Van Camp & Sons v. American Can Co.*, 278 U.S. 245, 254 (1929). It remained doubtful whether injury to an individual merchant competing amounted to a "substantial

lessening of competition" in that line of commerce within the meaning of the section. As the House Judiciary Committee Report on the Patman bill stated (H.R. Rep. 2287, 74th Cong., 2d Sess., p. 8):

> "The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger, general injury result."

Congressman Patman, in introducing the original bill (which did not, of course, include the Borah-Van Nuys amendment) said (79 Cong. Rec. 9078):

> "This bill is designed to accomplish what so far the Clayton Act has only weakly attempted, namely to protect the independent merchant, the public whom he serves, and the manufacturer from whom he buys, from exploitation by his chain competitor.
> The Goliath is the huge chain stores sapping the civic life of local communities * * *."

He stated that the weaknesses of the opponents of the chains were these:

> "Third. The disorganized individualism and hand to-mouth buying habits of the purchasing public, who cannot realize nor foresee — nor indeed resist if they could — the ultimate monopolistic motives concealed beneath the loss-leader prices and other trick merchandising tactics of the chains — practices which, because of their far-flung resources, they can concentrate with more deadly effect in one community at the cost of another."

Mr. Patman's report was based on the Trade Commission's report on chain stores, which emphasized time

and time again that one of the major competitive advantages of the chains was their ability to reduce their prices below their competitors in one locality, while maintaining prices in other communities to recoup any losses suffered. *Final Report of Chain Store Investigation, supra,* pages 34, 38, 50, 51. Existing antitrust laws apparently did not concern their officials.

> "And in this connection it is interesting to note that, although perhaps aware of their existence chain store officials in discussing their price policies make little or no mention of State or Federal laws against price discrimination as influencing or limiting such policies." *Final Report of Chain Store Investigation, supra,* Page 34

The Federal Trade Commission in discussing price competition by the chains, stated in the *Report*, supra, pages 50 and 51:

> "As shown in sections 2 and 3 of this chapter, chains frequently sell the same quality goods at the same time at different prices in their various stores. This manifests itself in the form of leaders and so-called 'loss-leaders' at some stores, in the pricing of private brands, and in differences between the headquarters price and the branch store price on many articles. The ability of chain stores to vary prices among their different branches and thus to average their profits results in one of their chief advantages over independents. * * * This means that chain store systems will probably continue to increase in size and tend more and more toward a monopolistic position. And their legal position will be impregnable under the Supreme Court's view that mere size or possession of monopolistic power without abuse is no violation of the Sherman Act. The only vulnerable spot under existing law is prevention of methods which lead to that result.

"Section 2 of the Clayton Act forbids discrimination in price where the effect 'may be to substantially lessen competition or tend to create a monopoly in any line of commerce'. Variation in price between different branches of a chain would seem to be a discrimination, the effect of which 'may be' to produce the forbidden results. *It is one thing, however, to reach such a broad conclusion on the results of this practice by chains in general and quite another to prevent by legal means its use by some particular chain.*"
(emphasis supplied)

In discussing state legislation dealing with the chain store problem, the report pointed out on page 83 that 31 states had enacted laws making it unlawful to discriminate in price between different sections, communities, or cities of the state, in the sale of any commodity. In discussing the legal remedies available under then existing federal statutes, the report pointed out, with respect to price discriminations, that during the period of most extensive growth of the chains, the Commissioon was prevented by court decisions from making effective use of Section 2 of the Clayton Act and that there remained the question whether substantial lessening of the competition in intrastate retail distribution was within the scope of the state.

The Borah-Van Nuys bill, which later became Sections 3 and 4 of the Robinson-Patman Act, was one of a number of bills considered by Congress, all of which were concerned with implementing the Clayton Act. Thus, Senator Robinson said, (80 Cong. Rec. 6277), in the discussion as to whether the Borah-Van Nuys bill should be incorporated into his bill as an amendment:

"It has been said that there is a large number of measures dealing with this subject pending before the two Houses. There are several bills in the House, and I think there are more than two bills in the Senate, and each

one of those measures reflects difference of opinion as to some details; but the purpose of this proposed legislation runs through all the bills, and that is to correct the defects in the Clayton Antitrust Act which undertook to prevent by law unfair price discriminations which gave to those who had the power to do so the opportunity to destroy their competitors and to gain a monopoly of the business in which they were interested, to the detriment of both dealers and consumers. Those who are sincerely interested in that purpose may stand on a common ground.

"They may differ respecting some details, but if they are earnestly desiring to prevent the building up of monopolies in this country in the trade of the country they may adjust their differences and reach a fair conclusion."

The Borah-Van Nuys bill was considered both in the Senate and the House as a possible substitute for the Robinson and Patman bills. In the debate on the Robinson and Borah-Van Nuys bills in the Senate on April 29, 1936, (80 Cong. Rec. 6330 et seq.), Senator Logan remarked that all the witnesses at the committee hearings had agreed that the Clayton Act should be amended. Senator Austin stated that a great number of the witnesses had expressed preference for the Borah-Van Nuys bill over the Robinson-Patman bill. Senator Logan agreed, and asked id., p. 6333,

"MR. LOGAN: * * * But are not the objectives of the Borah-Van Nuys bill exactly the same as the objectives of the Robinson bill, and is not the only disagreement as to the language used in reaching the objectives?

* * *

MR. BORAH: I think the objectives of the two bills are the same. * * *."

The Borah-Van Nuys bill was offered by Senator Borah

as an amendment to the Robinson bill in the Senate (80 Cong. Rec. 6279), and it was agreed to as an amendment to the committee amendment (80 Cong. Rec. 6351). Senator Logan, Chairman of the Sub-Committee which had considered the Robinson bill, Senator Robinson, its author, and Senator Borah, expressed agreement that "one of the defects of the pending bill (the Robinson bill) is that it imposes no specific penalty for violation of its provisions" (id., at 6348) and "that it does not give the party in interest an adequate remedy in all cases" (id. at 6349). The Borah-Van Nuys bill was accepted by the Senate as an amendment to the Robinson bill (id., at 6351). When the Robinson bill passed the Senate, the Borah-Van Nuys bill appeared as subsection (h) of the proposed amendment of Section 2 of the Clayton Act, and was enclosed in quotation marks. It was thus passed initially by the Senate as a portion of a bill expressly amending Section 2 of the Clayton Act.

In the House, the Borah-Van Nuys bill was first introduced by Congressman Healy of Massachusetts on May 28, 1936, as a *substitute* for the Patman bill (id., at 8227). In introducing the amendment (which was rejected at that time by the House) Mr. Healey said:

> "The Borah-Van Nuys bill is the only bill that has been offered on this subject, in my judgment, that does not directly or indirectly fix prices. It therefore more nearly conforms to the spirit of the Clayton Antitrust Act than many of the provisions of the bill (the Patman bill) under discussion."

The House passed the Patman bill, H.R. 8442 on May 28, 1936, (id., at 8242), and sent its bill to the Senate (id., at 8279), without taking notice of the Senate bill. Senator Robinson, noting that that was a parliamentary practice which "is inexplicable, because it requires the Senate to

pass the bill twice" (id., at 8403), advised that he would strike out all after the enacting clause of the House bill and insert thereof the language of the bill passed by the Senate. This was done (id., at 8419), and H.R. 8442 as so amended was passed on June 1, 1936. Senators Logan, Van Nuys, McGill, Borah and Austin were appointed conferees for the Senate, (id., at 8419); and Congressmen Utterback, Miller, Celler, McLaughlin, Sumners, Guyer and Robsion for the House, (id., at 8617).

The House conferees accepted the Borah-Van Nuys provision, but separated it from the portion of the bill which expressly amended Section 2 of the Clayton Act, and set it out, excepting for the paragraph relating to co-operatives, as Section 3 of the conference bill. The paragraph relating to co-operatives was set forth as Section 4 of the conference bill. The conference report on Section 3 stated in substance that the section did not affect the scope or operations of the prohibitions laid down by "the Clayton Act amendment provided for in Section 1"; that most of the acts prohibited also lay within the prohibitions of Section 1, as amended; that the section "merely attaches to them its criminal penalties in addition to the civil penalties and remedies already provided by the Clayton Act." (id., 9419)

The following discussion of the conference report took place in the House (id., 9420):

> "MR. CELLER: Also let me point out that this bill is an amendment to the Clayton Act, which provides that anyone aggrieved by any discrimination in price or discount or allowance can sue and recover triple damages from the person guilty of the discrimination. In addition, for the same act of discrimination, to the triple damages the businessman accused can, by Section 3 of this bill, be hailed to court and fined $5,000

or imprisoned for 1 year. I ask you to think carefully before you accept such a bill with such penalties.

* * *

MR. HANCOCK *of New York:* If a vendor is found guilty of discrimination as provided in this bill, is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?

MR. CELLER: If he violates the Borah-Van Nuys provision or the other provision of the bill, he is subject to penalties of a criminal nature and has committed an offense.

MR. HANCOCK *of New York:* Would he also be liable for triple damages?

MR. CELLER: And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue."

Petitioner concludes from the above discussion and from the portion of the debate quoted at pages 27 to 29 of the Brief in Chief, that it was intended that the treble damage remedy under the Clayton Act be separate and distinct from the criminal penalties of Section 3 of the Robinson-Patman bill. What Mr. Miller was actually trying to make clear was that the criminal penalties were separate and distinct and applied only to violations of Section 3 of the latter act. In the course of his remarks, however, he makes his views clear that he assumed, as did Mr. Celler and others, that the triple damage remedy was applicable to violations of Section 3, as well as to violations of the first section of the bill.

It is further obvious from the following remarks of Senator Van Nuys (id., 9903), one of the authors of Section 3, that he considered the treble damage remedy applicable to that section:

"MR. VANDENBURG: Mr. President, I should like

to ask the Senator from Indiana one or two questions about the conference report.

The fact has been called to my attention that *Section 3 of the bill, as agreed upon in conference, makes certain discriminations punishable by fine and also subject to treble damages*, while similar discriminations under section 2 (b) would be subject to rebuttal by showing, for instance, that a reduced price was made in good faith to meet an equally low price of a competitor. In other words, it is asserted to me that the defense allowed under section 2 (b) is not permitted under section 3, although the act or the offense would be the same. (emphasis supplied)

MR. VAN NUYS: I think the Senator is mistaken there. The proviso to which he refers is simply a rule of evidence rather than a part of the substantive law. If a prima facie case is made against an alleged unfair practice, the respondent may rebut the prima facie case by showing that his lower prices were made in good faith to meet the prices of a competitor. That is a rule of evidence rather than substantive law."

If Senator Vandenburg had been incorrect in his assumption that "section 3 * * * makes certain discriminations * * * also subject to treble damages", Senator Van Nuys would have certainly corrected such a serious error.

Thus, it is submitted, the history of the Robinson Patman Act, considered in the light of experience in antitrust enforcement under the Clayton Act, makes it clear that Section 3 was an integral part of the Robinson-Patman Act, that the entire act was intended to amend the Clayton Act, and that the triple damage remedy, which has always been an important adjunct of antitrust law enforcement [Radovich v. National Football League, 352 U.S. 445, (1957)] was intended to be available to persons injured by violations of Section 3.

III.

THE SPECIFICATION OF CERTAIN ANTITRUST LAWS IN SECTION 1 OF THE CLAYTON ACT WAS NOT INTENDED TO EXCLUDE LATER ENACTMENTS IN THE ANTITRUST FIELD.

The statement in Section 1 of the Clayton Act, 38 Stat. 370, that "antitrust laws" as used therein "includes" the acts specifically referred to in that section, which were all the then existing laws in that field, was not intended by Congress as an all-embracing definition which would exclude later enactments whose purpose was the protection of competition and the prevention of monoply.

This Court has pointed out several times that the word "including" is not all-embracing, and unless a contrary intent of the users of the word is clear, it is merely illustrative, and does not have the effect of excluding matters in the general category.

In *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), the State of North Dakota sought to impose a sales tax on purchases of the Federal Land Bank of St. Paul for repair of properties acquired on foreclosure. Section 25 of the Federal Farm Loan Act of July 17, 1916, 39 Stat. 360, 380, provided in part:

> "That every Federal Land Bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal and local taxation, except taxes upon real estate held, purchased or taken by said bank or association under the provisions of section eleven and section thirteen of this Act."

The Supreme Court of North Dakota had affirmed the

judgment of the trial court imposing the tax [70 N. D. 607, 297 N.W. 42, 52 (1941)], holding, as petitioner argues here,

> "When Congress used the word 'including' it sought to define exactly what was exempted * * *"

This Court, in reversing the judgment and holding that the purchasers were exempt from tax, stated, 314 U.S. 99:

> "The unqualified term 'taxation' used in § 26 clearly encompasses within its scope a sales tax such as the instant one, and this conclusion is confirmed by the structure of the section. In reaching the opposite conclusion the court below ignored the plain language, 'That every Federal land bank * * * shall be exempt from Federal, State, municipal, and local taxation,' and seized upon the phrase, 'including the capital and reserve or surplus therein and the income derived therefrom,' as delimiting the scope of the exemption. The protection of § 26 cannot thus be frittered away. *We recently had occasion under other circumstances to point out that the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.* Phelps Dodge Corp. v. Labor Board, 313 U. S. 177, 189; see also Helvering v. Morgan's, Inc., 293 U.S. 121; 125." (emphasis supplied)

In *Helvering v. Morgan's, Inc.*, 293 U.S. 121 (1934), the government contended that a taxpayer had forfeited the privilege of taking its tax loss in the year 1927 by making a return for the first five months of 1925 and another return for another period in 1925, and in so doing had used the two succeeding "taxable years" in which losses could be deducted under Section 206 of the Revenue Act of 1926. Section 200 (a) of the statute defining taxable year read as follows:

"The term 'taxable year' means a calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under Section 212 or 232. The term 'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December. The term 'taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. . . ."

This Court held that the separate period within one year before and after affiliation of the taxpayer with another corporation did not constitute two taxable years, so as to preclude the deduction of a net loss for the second full year after affiliation, saying at 293 U.S. 124;

"The provision that the term 'taxable year' 'includes' the period of less than twelve months for which a separate return is made, when read only with its immediate context, is not free from ambiguity. It may be admitted that the term 'includes' may sometimes be taken as synonymous with 'means', and that the subsection may be taken to require, as the Government contends, that a fractional part of a normal taxable year of twelve months for which a return is made shall be treated, for all purposes, as a separate taxable year.

But the phraseology is also open to the construction that the word 'includes' is used as the equivalent of 'comprehends' or 'embraces', and that by it the Section merely adopts a familiar device in aid of statutory construction, by providing that wherever other Sections refer to a "taxable year' that phrase may, if the context requires, be taken also to refer to or to 'include' a fractional part of that taxable year, for which a separate return is made. If the language is so construed and applied here, 'the losses sustained for any

> taxable year' which Section 206 permits to be carried forward would include the loss sustained for the first five months of the taxable year for which the separate return was made, and that loss, as well as any other loss separately reported for the remaining part of the taxable year, not otherwise absorbed, could be carried forward to the taxpayer's next two taxable years, here the calendar years of 1926 and 1927."

Similarly, in *Gray v. Powell*, 314 U.S. 402, 416 (1941), it was said:

> "The definition of disposal as including 'consumption or use by a producer, and any transfer of title by the producer other than by sale' cannot be said to put a meaning on disposal limited to the inclusion."

Petitioner's argument that the remedies provided by Section 4 of the Clayton Act are not applicable to violations of Section 3 of the Robinson-Patman Act would have been tenuous indeed had Congress, in Section 1 of the Clayton Act, not enumerated certain statutes to be included as "antitrust laws." It would have been assumed without question, in the light of the history of the two acts, that the Robinson-Patman Act as a whole was one of the antitrust laws for which the various civil remedies were available to persons injured.

The answer to the question presented for review should then be apparent from a study of the purpose of Congress in specifying the then existing antitrust laws in Section 1 of the Clayton Act. This was clarified by Mr. Floyd, one of the House conferees on the Clayton Act, in his explanation of the conference report, October 8, 1914, 51 Cong. Rec. 16319:

> "MR. FLOYD of Arkansas: ******* Under Section 4 of the bill reported by the conferees any person injured

in his business or property by anything declared to be unlawful in any antitrust law or by this act is entitled to go into any district court without regard to the amount in controversy and recover threefold damages. Is there any leniency in that?

That is a reenactment of Section 7 of the Sherman antitrust law. *******

That is not all. Under section 5 of the bill any private litigant injured by the unlawful acts of any corporation where the Government of the United States has proceeded against such corporation and obtained a judgment, either in a court of law or equity, is allowed the use of that judgment or decree to show the unlawful acts of the combination to the full extent that it would be an estoppel between the Government and the original offender. ********

But that is not all. In section 16, on page 20, is a provision that gives the litigant injured in his business an entirely new remedy, one that he never enjoyed before. ******

This provision in section 16 gives any individual, company, or corporation, damaged in its property or business by the unlawful operation or actions of any corporation or combination the right to go into court and enjoin the doing these unlawful acts, instead of having to wait until the act is done and the business destroyed and then sue for damages. ****** Teeth all taken out of the bill! We have taken, by these provisions, the business public into our confidence as allies of the Government in enforcing the antitrust laws, and given to the business men of the country who are being imposed upon by unlawful combinations remedies by which they can recover their own damages without waiting upon the slow and tortuous course of prosecution on the part of the Government.

But that is not all. There are several other remedies provided in this bill. Under section 11 the violation of sections 2, 3, 7 and 8 may be enforced, respectively,

by the Trade Commission, by the Interstate Commerce Commission, or by the Federal Reserve Board. * * * * * * *"

Mr. Floyd went on to explain that the remedies before the Commission were not exclusive, but cumulative, and not intended to exclude the remedies that existed under the Sherman Law "because under the provisions of the bill that is carefully guarded". The following colloquoy took place (ibid.):

"MR. COOPER: Will the gentleman permit an interruption? He has reached one of the most important points in this discussion, and I would like to ask him a question.

MR. FLOYD of Arkansas: I will yield to the gentleman from Wisconsin.

MR. COOPER: The title of this act is 'An Act to supplement existing laws against unlawful restraint and monopolies and for other purposes.' If I understand the gentleman, it is his contention, in supporting this conference, that the criminal clauses of the Sherman law are still in force and that this act simply supplements them?

MR. FLOYD of Arkansas: Certainly; that is correct.

MR. COOPER: And that those criminal clauses are not repealed?

MR. FLOYD of Arkansas: They are not repealed in any sense—in section 11, as agreed to by the conferees, on page 18 of the comparative print, the following language is found:

> 'No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust acts.'

And the 'antitrust acts' include the Sherman antitrust law, and include the other acts specified in the first

section of this bill, and include everything in this act. Who can contend in the face of that declaration, as the distinguished gentleman from Minnesota did last night, that these provisions amend or affect adversely in some way the Sherman Law? *This saving clause completely settles that controversy as to any and all of the antitrust acts. These sections 2, 3, 7, and 8, are parts of this act, and every section in it are declared to be parts of the antitrust acts.*" (emphasis supplied)

Section 1 of the Act, considered in the light of the paragraph in Section 11, quoted above by Representative Floyd, and a similar provision in Section 7 of the Act, providing that the criminal penalties and the civil remedies otherwise available under the "antitrust laws", should remain unaffected, was the result of the effort of the framers of the Act to answer critics of the bill who contended that the criminal penalties had been removed, and the civil remedies impaired. (See additional remarks of Rep. Floyd, 51 Cong. Rec. 16320). Mr. Floyd's statement that "*This saving clause completely settles this controversy as to any and all of the antitrust laws*" demonstrates conclusively that existing antitrust laws were not specified in Section 1 of the Act for the purpose of limiting the definition to the laws specified, nor to exclude thereby any act that by its purpose should be classed as an antitrust law. The codifiers of the United States Code have recognized this, and the courts have also generally so held.

IV.

CODIFICATION OF SECTION 3 AS ONE OF THE ANTITRUST LAWS CONSTITUTES AN ESTABLISHED ADMINISTRATIVE INTERPRETATION THEREOF.

Additions and supplements of the United States Code have been prepared and published under the supervision

of the Judiciary Committee of the House of Representatives since 1947 (61 Stat. 633). Prior to that time, they were prepared under the supervision of the House Committee on Revision of the Laws. (45 Stat. 1541). Interpretations of the statutes by the codifiers should certainly be of persuasive weight unless an obvious error has been made or unless a different meaning is too clear to be ignored.

The codifiers clearly intended to include Section 3 of the Robinson-Patman Act as one of the antitrust laws. In the 1940 Code, the various sections of the Act were codified as Sections 13a, 13b, 13c, and 21a of Title 15. In none of these sections were the words "antitrust laws" used. The codifiers, therefore, changed the wording of Title 15, § 12 appearing in the 1926 Code as follows:

> "'Antitrust laws', as used in Sections 12-27 of this title, includes Sections 1-27 of this title."

to the following wording of the 1940 Code:

> "'Antitrust laws', as used in Sections 12, 13, 14-21 and 22-27 of this title, includes Sections 1-27 of this title."

Changes in this section, rather than indicating an error on the part of the codifiers, as argued by petitioner, (Br. 14-15), are expressive of an intent to retain all of the Robinson-Patman Act sections as "antitrust laws" within the meaning of Section 12. The changes are certainly not the result of an obvious error, or a lingering on in successive editions of the Code, as in *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 164, note (1942), or *Stephan v. United States*, 319 U.S. 423, 426, (1943). As Judge Yankwich stated in *Balian Ice Cream Co. v. Arden Farms Co., supra*, at page 802, the codifiers had a sound understanding of the relation of the Robinson-Patman Act to pre-

ceding legislation, and considered all its provisions, including Section 3, as amendatory of the Clayton Act.

The designation of Section 3 as one of the antitrust laws for which there is a treble damage remedy under Section 4 of the Clayton Act has been approved, almost without exception, by the United States District Courts (Cases cited infra). This Court has reached the same conclusion. *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 750 (1947); and *Moore v. Mead's Fine Bread*, 348 U.S. 115, 118 (1955). Congress has presumably approved this construction, since it has taken no action to change the sections in question. *United States v. Elgin, Joliet & Eastern Railway Company*, 298 U.S. 492, 500, (1936). See *United States v. Dakota-Montana Oil Company*, 288 U.S. 459, 466 (1933).

V.

THE COURTS HAVE GENERALLY HELD THAT TREBLE DAMAGES ARE RECOVERABLE UNDER SECTION 3 OF THE ROBINSON-PATMAN ACT.

Except for the decision of the District Court in the instant case, and that of the Court of Appeals of the Seventh Circuit in *Nashville Milk Company v. Carnation Company*, 238 F. 2d 86, both now before this Court for review, the lower courts have generally held that treble damages were recoverable under Section 3 of the Robinson-Patman Act. *Atlanta Brick Co. v. O'Neal*, 44 F. Supp. 39 (E.D. Tex. 1942); *A. J. Goodman and Son v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D. Mass., 1949); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408, (D. Conn., 1950); *Balian Ice Cream Co. v. Arden Farms Co., supra; Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S.D. Cal., 1951); *Wildes Kohinoor,*

Inc. v. Stabile, 140 F. Supp. 916, (S.D. N. Y., 1956). Judge Yankwich's scholarly and exhaustive opinion in *Balian Ice Cream Co. v. Arden Farms Co., supra,* has also been quoted with approval by the Court of Appeals of the Ninth Circuit in *Karseal Corporation v. Richfield Oil Corp.*, 221 F. 2d 358, 365 (1955).

National Used Car Market Report, Inc. v. National Auto Dealers Association, 108 F. Supp. 692, (D.D.C. 1951) cited by petitioner on page 31 of its brief, actually did not decide the question at issue. The Court said at page 694:

> "But assuming, without deciding, that such an action is maintainable under Section 3 of the Robinson-Patman Act, the count still must be dismissed. The Court feels that the allegations of the complaint are merely repetitions of the language of the Statute."

The Court of Appeals of the District of Columbia affirmed the decision of the District Court for the same reason, not as petitioner infers, on the ground that the treble damage remedy is not applicable to a violation of Section 3 of the Robinson-Patman Act. 200 F. 2d 359 (1952).

The authors of the law review notes and comments cited by petitioner either ignore the legislative history of the Robinson-Patman Act, or reach their conclusions on the basis of disagreement with congressional policy, which is not a matter before this court. The Attorney General's National Committee to Study the Antitrust Laws, in its *Report* of March 3, 1955, expresses general distaste for Section 3, and recommends repeal of the section. The conclusions of the various student-authors of law review notes and comments and other writers cited by petitioner have, as we have seen, not been accepted either by the courts or by Congress. Other student-authors have reached the op-

posite conclusion. 32 *N.Y.U. L. Rev.* 1149, (1957); 70 *Harv. L. Rev.* 1490 (1957).

This Court, as mentioned above, has twice indicated, in cases in which the question was not directly raised, that the treble damage remedy was applicable to Section 3. In *Bruce's Juices, Inc. v. American Can Co., supra* at page 750, it was said:

> "The Act prescribed sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. 49 Stat. 1528, c. 592, 15 U.S.C.A. § 13a, 4 FCA, title 15 § 13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. (October 15, 1914), 38 Stat. 730, 731, c. 323, 15 U.S.C.A. § 15 FCA title 15 § 15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."

Again, in *Moore v. Mead's Fine Bread*, supra, this Court considered a triple damage suit for violations of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, and Section 3 of the latter act, and expressed no doubt but that the civil remedy was equally applicable to both sections. After setting forth the provisions of the section involved, this Court said, page 118:

> "Those sections on their face seem to cover the instant case. Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such business, it made price discriminations, maintaining the price in the *interstate* transactions and cutting the price in the *intrastate* sales. The destruction of a competitor was plainly established, as required by the

amended § 2 (a) of the Clayton Act; and the evidence to support a finding of purpose to eliminate a competitor, as required by § 3 of the Robinson-Patman Act, was ample."

CONCLUSION

We respectfully submit for reasons stated, that the decision of the Court of Appeals, Tenth Circuit, should be affirmed.

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Appendix I

STATUTORY PROVISIONS

The Robinson-Patman Act 49 Stat. 1526

An Act

To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., Title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., Title 15, sec. 13), is amended to read as follows:

"Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either

of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide tranactions and not in restraint of trade; And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the foods concerned, such as but not limited to actual or imminent deterioration on perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation this section, and unless justification shall be affirmatively shown, the discriminations: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchase or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Sec. 2. That nothing herein contained shall affect rights

of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on Section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: Provided, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon, the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter, the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully as to the same extent as if such supplementary proceedings had not been taken.

Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

Sec. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Approved, June 19, 1936.

CLAYTON ACT, SECTION 4,
38 STAT. 731, TITLE 15 USC 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold, the damages

by him sustained, and the cost of suit, including a reasonable attorney's fee."

CLAYTON ACT, SECTION 1,
38 STAT. 730 (1st paragraph)

"That 'antitrust laws' as used herein includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', of August twenty-seventh, eighteen hundred and ninety-four; an Act, entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved February twelfth, nineteen hundred and thirteen; and also this act."

TITLE 15 USC 12 (1st paragraph)

"'Antitrust laws,' as used in sections 12, 13, 14-21, and 22-27 of this title, includes sections 1-27 of this title."

Appendix II

The Borah-Van Nuys Amendment.

The Borah-Van Nuys amendment which was offered by Senator Borah as Sec. 2 of the Robinson bill (80 Cong. Rec. 6346) reads as follows (80 Cong. Rec. 6349):

Sec. 2. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Nothing in this section shall prevent a cooperative association from returning to producers or consumers, or a cooperative wholesale association from returning to its constituent retail members, the whole, or any part of, the net surplus resulting from its trading operations in proportion to purchases from, or sales to, the association.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 1 year, or both.

INDEX

AUTHORITIES

Supreme Court of the United States

October Term, 1957

No. 69

SAFEWAY STORES, INCORPORATED,
a corporation,
Petitioner,
vs.
HARRY V. VANCE, Trustee in
Bankruptcy for
FRANK MELVIN THOMPSON, BANKRUPT,
Respondent.

PETITION OF HARRY V. VANCE, TRUSTEE IN BANKRUPTCY FOR FRANK MELVIN THOMPSON, BANKRUPT, FOR REHEARING

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Comes now the above-named Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, and presents this, his Petition for Rehearing in the above entitled cause, and in support thereof, adopts the Petition of Nashville Milk Company for Rehearing in Cause Number 67, October Term, 1957, in this Court.

Petitioner further respectfully submits that the remarks of Representative Celler during the debate on the conference report in the House, as well as the debate in the Senate, indicate that the House conferees and the authors of the Act in the Senate considered that the entire Robinson-Patman Act was intended to amend the Clayton Act.

I.

THE ENTIRE ROBINSON-PATMAN ACT WAS INTENDED TO AMEND THE CLAYTON ACT

The statements of Representative Celler in the House of Representatives and the statement of Senator Van Nuys in the Senate fairly indicate that the Robinson-Patman Act in its entirety was accepted as an amendment to the Clayton Act, and that the treble damage remedy was considered applicable to Section 3 of that Act. The following remarks of Representative Celler, ranking member of the House Conference Committee cannot, it is submitted, be logically interpreted except in the light that Section 3 of the Robinson-Patman Act carried the treble damage penalty (80 Congressional Record 9420):

> "MR. CELLER: I ask the gentleman to read Section 3, the Borah-Van Nuys provision, and then read section 2 and section 1 and see whether that is so.
>
> Also, let me point out, *this bill is an amendment to the Clayton Act, which provides that anyone aggrieved by any discrimination in price or discount or allowance can sue and recover triple damages from the person guilty of the discrimination. In addition, for the same act of discrimination, to the triple damages the businessman accused can, by section 3 of this bill, be hailed to court and fined $5,000 or imprisoned for 1 year.* I ask you to think carefully before you accept such a bill with such penalties." (Emphasis supplied)

> "MR HEALEY: One further question, if the gentleman will permit. In the gentleman's judgment, the Borah-Van Nuys amendment in and of itself would amply take care of the situation?
>
> MR. CELLER: There is no question but what the Borah-Van Nuys provision in and of itself would be

sufficient. I would have gladly supported this bill in its entirety if this provision had been controlling.

MR HANCOCK of New York: Mr. Speaker, will the gentleman yield?

MR. CELLER: I yield.

MR HANCOCK of New York: If a vendor is found guilty of discrimination as provided in this bill, is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?

MR. CELLER: If he violates the Borah-Van Nuys provision or the other provision of the bill he is subject to penalties of a criminal nature and has committed an offense.

MR. HANCOCK of New York: Would he also be liable for triple damages?

MR CELLER: *And he would also have to respond in triple damages under the provisions of the Clayton Act.* Anyone aggrieved can sue." (Emphasis supplied)

It should be noted that Senator Robinson had said (80 Congressional Record 6277) that the purpose of all this legislation was to correct defects in the Clayton Anti-trust Act. Senator Logan and Senator Borah had agreed that the objectives of the Borah-Van Nuys Amendment were the same as the objectives of the Robinson Bill (80 Congressional Record 1633).

Representative Healey had stated that the Borah-Van Nuys Bill more nearly conformed to the spirit of the Clayton Act than many of the provisions of the Patman Bill (80 Congressional Record 8227). Mr. Celler's statement in the debate last above quoted that "there is no question but the Borah-Van Nuys provision in and of itself would be sufficient" is therefore particularly significant. The inference seems inescapable that the Borah-Van Nuys provision, as a whole, was considered an act whose purpose was to correct

the defects in the Clayton Antitrust Act, and was in its entirety an amendment to that Act as stated by Representative Celler.

The assertion of Senator Vandenberg at 80 Congressional Record 9903:

> "The fact has been called to my attention that Section 3 of the Bill, as agreed upon in conference, makes certain discriminations punishable by fine and also subject to treble damages, while similar discriminations under Section 2 (b) would be subject to rebuttal by showing, for instance, that a reduced price was made in good faith to meet an equally low price of a competitor . . . ."

uncontroverted by Senator Van Nuys, is equally persuasive proof that Section 3 was considered in the Senate as an amendment of the Clayton Act, and as carrying the treble damage remedy.

For the foregoing reasons, and for the reasons set forth in the Petition of the Nashville Milk Company for rehearing, it is respectfully urged that this Petition for Rehearing be granted, and that the Judgment of the Court of Appeals of the Tenth Circuit, upon further consideration, be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Robert J. Nordhaus, one of counsel for the above named petitioner, Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt, do hereby certify that the foregoing Petition for rehearing of this cause is presented in good faith and not for delay.

ROBERT J. NORDHAUS,
One of counsel for Harry V. Vance,
Trustee in Bankruptcy for
Frank Melvin Thompson, Bankrupt

PETITIONER'S MOTION TO MODIFY ORDER OR CLARIFY OPINION

Supreme Court of the United States

October Term, 1957

No. 69

SAFEWAY STORES, INCORPORATED
a corporation

Petitioner,

vs.

HARRY V. VANCE, Trustee in
Bankruptcy for
FRANK MELVIN THOMPSON, BANKRUPT,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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First National Bank Bldg.,
Albuquerque, New Mexico

W. A. KELEHER,
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PETITIONER'S MOTION TO MODIFY ORDER OR CLARIFY OPINION

Petitioner respectfully moves that the opinion and order in this case be modified in the following respects:

1. That the judgment of the Court of Appeals be reversed without remand to the District Court, or

2. In the alternative, if remanded, that the language in the last paragraph of the opinion, reading: "... and that the respondent *was* entitled to a trial as to the charges of unlawful price discrimination" be amended to read: "... and that the respondent *may be* entitled to a trial as to charges of unlawful price discrimination".

STATEMENT

The only issue presented to the Court for decision was whether a private remedy existed for violation of Section 3 of the Robinson-Patman Act as such. Respondent's first amended complaint (R. 1-5) charged only a violation of that section. The area price discrimination alleged was limited specifically to violations of Section 3 (R. 3). Respondent did not attempt to allege a violation of Section 2 of the Clayton Act, and did not do so.

In the original order dismissing the complaint, the respondent was given thirty days in which to amend (R. 8). Respondent elected not to amend, but to rest his case solely upon violations of Section 3 of the Robinson-Patman Act. A formal election to this effect was duly filed (R. 27).

The court held in this case, and in Nashville Milk Company vs. the Carnation Company, No. 67, that a private cause of action does not lie for violation of Section 3 of the Robinson-Patman Act as such. Since respondent formally elected to proceed only under said Section, and stood upon said election throughout this litigation, it is respectfully submitted that the more appropriate disposition of this cause is the reversal of the judgment of the Court of Appeals of the Tenth Circuit, without remand.

If the case is to be remanded for further proceedings in the District Court, it is respectfully submitted that the

language of the opinion stating that respondent "... *was* entitled to a trial as to the charges of unlawful price discrimination", should be clarified. That language can be construed as a holding of this Court, that respondent's first amended complaint in its present form is sufficient as a matter of pleading to allege price discriminations which violate Section 2(a) of the Clayton Act. The sufficiency of the first amended complaint to allege a price discrimination which violated Section 2(a) of the Clayton Act was not an issue before this Court. The question was neither presented, briefed, nor argued. It was not passed upon by either of the Courts below. It is a question which in the first instant should be decided by the trial court.

It is respectfully submitted that respondent's first amended complaint in its present form is insufficient to allege a price discrimination which violates Section 2(a) of the Clayton Act, in that it fails to allege that at least one of the purchases involved in such discrimination was in commerce.

The Court's opinion does not refer to the respondent's election to stand upon his first amended complaint (R. 27) and does not purport to decide the effect of such election. No such issue was presented to this Court for decision and was neither briefed nor argued. Whether further amendment of the complaint should be allowed in view of said election is a question resting primarily in the discretion of the District Court.

In view of the above, it is respectfully submitted that the order of this Court should be modified so as merely to reverse the judgment of the Court of Appeals for the Tenth Circuit. If the case is to be remanded, it is further respectfully submitted that the remand should be in such terms as

will permit the District Court to decide all issues presented to it concerning a violation of Section 2(a) of the Clayton Act, particularly those of pleading and procedure indicated above.

Respectfully submitted,

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